(23,773)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 213.

THE HARTFORD LIFE INSURANCE COMPANY, HARTFORD, CONN., PLAINTIFF IN ERROR,

vs.

ELIZA IBS.

IN ERROR TO THE DISTRICT COURT IN AND FOR THE COUNTY OF RAMSEY, STATE OF MINNESOTA.

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a In the Supreme Court of the United States, April Term, 1913.

ELIZA IBS, Plaintiff, Defendant in Error,
vs.
THE HARTFORD LIFE INSURANCE COMPANY, OF HARTFORD, CONN., Defendant, Plaintiff in Error.

Pursuant to the Command of the Writ of Error herto annexed, issued in the foregoing entitled matter, and as therein commanded, I hereby Return therewith, annexed thereto, an authenticated transcript of the Record therein referred to, with all things concerning the same, the Assignment of Errors and prayer for reversal, and Citation to the Plaintiff, who is Defendant in Error; and I do Certify that there has been filed and now remains in my said office the Petition for said Writ of Error, and has been lodged in my said office copies of said Writ of Error and Citation for the use of the Defendant in Error, and the duly approved Supersedeas Bond.

Witness my hand and official Seal this 18th day of June, A. D., 1913.

[Seal District Court, Ramsey County, Minn.]

MATT JANSEN,
Clerk of the District Court for Ramsey County, Minnesota,
By N. C. ADONIRAM,
Chief Deputy

b Original.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the District Court of Ramsey County, State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Eliza Ibs, plaintiff, and The Hartford Life Insurance Company, Hartford, Conn., defendant, wherein was drawn in question the validity of a treaty or statute of, an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn

in question the construction of a clause of the Constitution,
c or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The Hartford Life Insurance Company, Hartford, Conn., as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the second day of June, in the year of our Lord one thousand nine hundred and thirteen.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
I am not clear that this writ should be allowed, but prefer that the doubt should be solved by the Court.

HORACE H. LURTON,
Associate Justice of the Supreme Court of the United States.

Jun- 2, 1913.

Endorsed: Filed Jun- 9, 1913. Matt Jensen, Clerk. By G. P. Ritt, Deputy.

d [Endorsed:] 12713. Received Jun- 9, 1913. John Wagner, Sheriff, by — Robert, Deputy.

The within Writ of Error was served on Eliza Ibs, the Plaintiff, on the 9th day of June, A. D., 1913.

____ ____,
Attorney for Eliza Ibs — the Within Mentioned Cause.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 9th day of June 1913, personally appeared before me, the subscriber, and makes oath that he delivered a true copy of the within Writ of Error to O. E. Holman Esq., attorney for Eliza Ibs, Plaintiff.

DANIEL O'CONNOR.

Subscribed to and sworn to by Daniel O'Connor this 9th day of June, 1913.

[Notarial Seal, Ramsey Co., Minn.]

FRANK ROBERT, Jr.,
Notary Public, Ramsey Co., Minn.

My Commission expires Oct. 6, 1913.

e Original.

UNITED STATES OF AMERICA, *ss:*

To Eliza Ibs, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the District Court of Ramsey County, State of Minnesota, wherein The Hartford Life Insurance Company, Hartford, Conn., is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Horace H. Lurton, Associate Justice of the Supreme Court of the United States, this second day of June, in the year of our Lord one thousand nine hundred and thirteen.

HORACE H. LURTON,
Associate Justice of the Supreme Court of the United States.

Filed Jun- 9, 1913. Matt Jensen, Clerk. By G. P. Ritt, Deputy.

f [Endorsed:] 12713. Received Jun- 9, 1913. John Wagner, Sheriff, by — Robert, Deputy.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 9th day of June, in the year of our Lord one thousand nine hundred and thirteen, personally appeared Daniel O'Connor before me, the subscriber, and makes oath that he delivered a true copy of the within citation to O. E. Holman, Esq., Attorney for Eliza Ibs, Plaintiff.

DANIEL O'CONNOR.

Sworn to and subscribed the 9th day of June, A. D. 1913.

[Notarial Seal, Ramsey Co., Minn.]

FRANK ROBERT, Jr.,
Notary Public, Ramsey Co., Minn.

My Commission expires Oct. 6, 1913.

The within Citation was served on Eliza Ibs, the plaintiff, on the 9th day of June, A. D., 1913.

—— ——,

Attorney for Eliza Ibs in the Within Mentioned Cause.

g In the Supreme Court of the United States.

THE HARTFORD LIFE INSURANCE COMPANY, HARTFORD, CONNECTICUT, Plaintiff in Error,
vs.
ELIZA IBS, Defendant in Error.

On Writ of Error to the District Court of Ramsey County in the State of Minnesota.

Assignment of Errors.

The plaintiff in error, The Hartford Life Insurance Company, Hartford, Connecticut, complains of Eliza Ibs and says that there is manifest error in the record in the above cause and in the decision and judgment of the said District Court of Ramsey County in the State of Minnesota, entered upon the specific order and direction of the Supreme Court of the State of Minnesota in this, to-wit:

First. The said District Court of Ramsey County, Minnesota, failed and refused to admit in evidence a decree of the Superior Court of New Haven County, Connecticut, in the case of Dresser and others v. The Hartford Life Insurance Company and others (Curtis, J.) duly exemplified under and in accordance with the acts of Congress, in which case there was involved and decided a controlling fact material to the determination of this cause, to which ruling the defendant then and there duly excepted, and which said ruling of said District Court was affirmed by the Supreme Court of the State of Minnesota, and by which ruling the court failed to give full faith and credit to such decree as is required by Article IV Section 1 of the Constitution of the United States and by which ruling the court also violated Article I Section 10 of the Constitution of the United States forbidding the passing of any law impairing the obligation of contracts.

h Second. The said District Court of Ramsey County, Minnesota, also failed and refused to admit in evidence another decree of the Superior Court of New Haven County, Connecticut, in the case of Dresser and others vs. The Hartford Life Insurance Company and others (Shumway, J.) duly exemplified under and in accordance with the acts of Congress, in which case there was involved and decided a controlling fact material to the determination of this cause, to which ruling the defendant then and there duly excepted and which ruling of the District Court was affirmed by the Supreme Court of the State of Minnesota and by which ruling the court failed to give full faith and credit to such decree as is required by Article IV, Section 1 of the Constitution of the United

States and by which ruling the Court also violated Article I, Section 10, of the Constitution of the United States forbidding the passing of any law impairing the obligation of contracts, as will appear from the following parts of the record in said cause:

Mr. DURMENT: "I offer in evidence Ex. 8, certified copy of the judgment in the New Haven Superior Court:

Mr. HOLMAN: That is objected to as incompetent, irrelevant and immaterial, no foundation laid; it appears from the papers that neither the plaintiff nor the insured was a party to the action; it appears from the paper offered that the cause of action there stated is not this cause of action.

The COURT: What is the purpose of this?

Mr. DURMENT: The purpose is this, Your Honor: This is a Connecticut corporation; it appears already in evidence, if not, we will show it by the deposition later, that this Mortuary Fund is kept in Connecticut, and our contention is that it is in the hands of this Company subject to a trust, to pay these claims, the claims against it; that the Company has been carried into court in its own jurisdiction, where this fund is in a law suit brought by a number of certificate holders against the defendant and others, to determine their right to the mortuary fund, and their rights and obligation under this contract, and these judgments have adjudicated and determined that matter, and this Company is bound by them and bound to administer that fund in accordance therewith.

The COURT: You mean they are Connecticut contracts, and this is the law of Connecticut which is in this contract?

Mr. DURMENT: Not only that but further than that, this is a suit here not for personal judgment against this defendant; this is a suit to recover $2,000 out of a certain fund. Now, that fund is maintained under the law of Connecticut and under Connecticut contracts and is located in Connecticut, and the trustee of this defendant company is in Connecticut, and the funds of this company are subject to the control of the Connecticut courts in respect to that.

The COURT: This is not a decision of the court of last resort?

Mr. HOLMAN: No, just a county court.

Mr. DURMENT: No, it is made in purusuance of its order.

Mr. HOLMAN: Not order.

Mr. DURMENT: No, but there are certain features of it that are— It went to a court of appeals, a court of last resort, and the finding of the lower court was modified to some extent.

Mr. HOLMAN: No, no, there was a demurrer to the complaint and that demurrer was sustained by the court below, went up to the Supreme Court and the court below was reversed, it was sent back for trial, and it was then tried by the New Haven court and this decision was rendered in the lower court and never went any higher.

Mr. DURMENT: But it is a court of competent jurisdiction, which had jurisdiction of the fund and defendant.

Mr. HOLMAN: That is disputed.

The COURT: Well, do you want to be heard on that.

Mr. HOLMAN: I do.

The COURT: Well, I will hear you Monday morning.

Adjourned until Monday, November 25, 1912, at 10 A. M.

Mr. DURMENT: When court adjourned we had offered in evidence a certified copy of the decree and presented it to the Court, and before urging that I desire to offer in evidence from the general statutes of Connecticut the revision of 1902, in force July 1, 1902, the Constitution of the United States, and the Constitution of the State of Connecticut (published by the authority of the State, the Hartford Press is the publisher), the case of Lockwood v. Brainerd & Co., 1902. From that I desire to offer Section 1 of Article V of the Connecticut Constitution.

Mr. HOLMAN: Objected to as incompetent, irrelevant, immaterial and no foundation laid.

Mr. DURMENT (reading): 'The judicial power of the state shall be vested in a supreme Court of errors, a supreme court, and such inferior courts as the General Assembly shall, from time to time, ordain and establish; the powers and jurisdiction of which courts shall be defined by law.'

And Sections 535 and 536 of the provision itself, on page 207, of this publication.

Mr. HOLMAN: Same objection. All this testimony may be taken, subject to my objection.

Mr. DURMENT (reading): 'Section 535: All civil actions for equitable relief only, or for legal relief, only, wherein the matter in demand exceeds $500, and does not exceed $1000, and all civil actions for both equitable and legal relief, wherein the equitable and legal relief, severally and distinctly demanded exceeds $500 and does not exceed $1000 may be brought either to the Superior Court or to the Court of Common Pleas, provided that said actions which are within the territorial jurisdiction of the District court of Waterbury, may be brought either to that Court or to the Superior Court'.

'SEC. 536. All civil actions wherein the relief legal or equitable, severally and distinctly demanded, exceeds $1000, shall be brought to the Superior Court but civil actions in Fairfield County, in which the relief demanded, as aforesaid, exceeds $500 and does not exceed $2000, including therein appeals from the doing of commissioners in insolvent estates, may be brought or taken to the Superior Court or to the Court of Common Pleas'.

'Now, your Honor, in connection with these statutes that I have read, we renew our offer as to the decisions.

Mr. HOLMAN: I renew the objection that I made on Friday afternoon to the offer of the judgment.

The COURT: Just what is this decision.

After Mr. Dument's statement, the court said:

I don't think the question involved in that case is the question involved in this case: I don't think the decision in that case even settles the law of Connecticut in this case. I think the objection to this ought to be sustained, and I will sustain it.

Mr. DURMENT: An exception to the ruling, and among other reasons for it, I want to appear in the record that it is (the ruling) in violation of Article IV, Section 1 of the Constitution of the United States, requiring 'full faith and credit' and also Article I, Sec. 10, which prohibits the state from making any law 'impairing the obligation of contracts', and also of the Fourteenth Amendment, which prohibits depriving one of property without due process of law.

We offer in evidence Ex. 9, which is a certified copy of the decree of the Superior Court of New Haven County, Conn.,—judgment signed by Shumway.

Mr. HOLMAN: Same objection to this offer as I made to the other. Same Ruling and exception."

Third. That the judgment of said District Court of Ramsey County, Minnesota, is also in violation of Article I, Section 10 of the Constitution of the United States, in this, that the contract sued on provides that the indemnity to be paid thereunder shall be payable out of the "Mortuary Fund and not otherwise" while the judgment of said district court is a personal one against the plaintiff in error and does not restrict the recovery to the money in the fund aforesaid.

Fourth. The District Court of Ramsey County, Minnesota, erred in not granting the motion to dismiss and in not holding that the failure of the insured to pay his quarterly dues worked a forfeiture of the policy in accordance with the terms of the contract sued on.

Fifth. The District Court of Ramsey County, Minnesota, erred in not directing judgment in favor of plaintiff in error (defendant below) upon the failure of proof that the insured had ever paid or tendered the amount of his quarterly dues, for the reason that there is no evidence that the Company had in its hands any funds out of which such dues might have been paid.

Sixth. The District Court of Ramsey County, Minnesota, erred in holding that the assessment was illegal because of the balance in the Mortuary Fund, notwithstanding the assessment was made in strict accordance with the terms of the contract sued on.

Seventh. That the District Court of Ramsey County, Minnesota, erred in holding that the assessment complained of was levied to pay anticipated death losses.

Eighth. The District Court of Ramsey County, Minnesota, erred in overruling the plaintiff in error's (defendant below) motion for judgment, notwithstanding the verdict.

Ninth. The District Court of Ramsey County, Minnesota, erred in overruling the plaintiff in error's (defendant below) motion for new trial.

Tenth. The Supreme Court of the State of Minnesota erred in affirming each of the rulings of the District Court of Ramsey County, Minnesota, and in directing judgment to be entered in favor of the plaintiff upon the verdict.

For all of which reasons plaintiff in error prays that said judgment may be in all things reversed, set aside and held for naught,

and that this Court direct a judgment to be entered in favor of the defendant in the court below.

THE HARTFORD LIFE INSURANCE COMPANY, HARTFORD CONNECTICUT,
By JAMES C. JONES,
EDMUND S. DURMENT,
GEO F. HAID,
JAMES C. JONES, JR.,
Its Attorneys.

Filed Jun- 9, 1913. Matt Jensen, Clerk. By G. P. Ritt, Deputy.

l [Endorsed:] In the Supreme Court of the United States. The Hartford Life Insurance Company, Hartford, Connecticut, Plaintiff in Error, vs. Eliza Ibs, Defendant in Error. Assignment of Errors. Jones, Hocker, Hawes & Angert, Attorneys at Law, Third National Bank Building, Saint Louis.

m 105,894. 166.

STATE OF MINNESOTA:

In Supreme Court, April Term, 1913.

ELIZA IBS, Respondent.
vs.
THE HARTFORD LIFE INSURANCE COMPANY, HARTFORD, CONN., Appellant.

PAPER BOOK.

M. D. Taylor, Commissioner.
Durment, Moore & Sanborn, Attorneys for Appellant, St. Paul, Minnesota.
O. E. Holman, Attorney for Respondent, St. Paul, Minnesota.

1 STATE OF MINNESOTA:

In Supreme Court, April Term, 1913.

State of Minnesota, District Court, County of Ramsey, Second Judicial District.

ELIZA IBS, Plaintiff,
vs.
THE HARTFORD LIFE INSURANCE COMPANY, HARTFORD, CONN., Defendant.

Complaint.

Plaintiff complains and alleges:
That during all the times herein mentioned the said defendant was, and still is, a corporation duly organized and existing under

the laws of the State of Connecticut; that up to the month of January, 1897, the defendant's corporate name was The Hartford Life and Annuity Insurance Company, Hartford, Conn., and that on or about the month of January, 1897, the corporate name of the said defendant was changed to The Hartford Life Insurance Company,
Hartford, Conn., and that said defendant was at all the times
2 hereinafter mentioned, and now is, engaged in the business of life insurance within the State of Connecticut and elsewhere, pursuant to the provisions of its articles of incorporation.

That on or about the 4th day of April, 1885, the said defendant, under the name of The Hartford Life and Annuity Insurance Company, Hartford, Conn., duly made, executed and delivered to one Hermann Ibs of the City of St. Paul in the said County of Ramsey, its certificate of membership numbered 70627 and bearing date April the 4th, 1885 in its Safety Fund Department, wherein and whereby, in consideration of the payment of ten dollars ($10.00) on each one thousand dollars ($1000.00) of the maximum indemnity provdied for in said certificate, to be paid by the said insured to create a Safety Fund, and of the payment of three dollars ($3.00) per annum on each one thousand dollars ($1000.00) for expense dues to be paid by the said insured to the said defendant, and in consideration of the further payment of all assessments duly and legally levied against the said insured to form a Mortuary Fund for the payment of all indemnity matured by deaths of members, the said defendant issued the said certificate of membership in its said Safety Fund Department to the said Hermann Ibs, and the said defendant in and by the said certificate of membership agreed that ninety days from the receipt by the President or Secretary of said
defendant, of satisfactory proof of the death of the said in-
3 sured, there shall be due and payab-e by the said defendant out of the said Mortuary Fund the maximum indemnity of two thousand dollars ($2000.00) to his wife, Eliza Ibs, the said plaintiff, and that in and by the said certificate of membership the said defendant agreed to pay to the said plaintiff, as the beneficiary named in the said certificate, the said sum of two thousand dollars ($2000.00) out of the said Mortuary Fund, and did thereby insure the life of the said Hermann Ibs for and during the term of his natural life in the said sum of two thousand dollars ($2000.00), payable to said plaintiff as such beneficiary.

That the said plaintiff was at the time of the issuance by said defendant of the said certificate of membership the wife of the said Hermann Ibs, the said insured, and continued to be the wife of the said insured until the time of his death, and as such had a valuable interest in the life of the said insured.

That on or about the 27th day of June, 1910, at the said City of St. Paul, in said County of Ramsey and State of Minnesota, the said Hermann Ibs, the said insured, died. That the said Hermann Ibs, the said insured, and the said plaintiff each duly fulfilled all the conditions of the said certificate of membership on their part.

That on or about the 22nd day of August, 1910, the said plaintiff duly notified the said defendant of the death of the said insured, and

of the date of his death, and requested the said defendant to forward to the said plaintiff, or her attorney, the necessary blanks, so as to enable the said plaintiff, as the beneficiary under
4 the said certificate, to prepare and deliver to said defendant and its President or Secretary proof of the death of the said insured, as required by the terms of the said certificate of membership.

That on or about the 31st day of August, 1910, the said defendant refused to deliver to the said plaintiff blanks as requested by said plaintiff so as to enable her to prepare and submit satisfactory proof of the death of the said insured and on said date last mentioned said defendant disclaimed any liability whatever upon the said certificate of membership and absolutely refused to pay the amount due the said plaintiff upon said certificate of membership, or any part thereof.

That the said Mortuary Fund has at all times since the death of the said insured been sufficient to pay the claim of the said plaintiff under the said certificate of membership, and that since the death of said insured the said defendant has had on hand in said Mortuary Fund and in said Safety Fund Department sufficient money to pay the said sum of two thousand dollars ($2000.00), together with interest thereon, agreed by said defendant to be paid to the said plaintiff as the beneficiary under said certificate of membership.

That the said defendant has refused to pay the said sum, or any part thereof, and that no part of the said sum covered by said certificate of membership has been paid, and that there is now due and owing to the plaintiff from the said defendant the sum of two thousand dollars ($2000.00), together with interest thereon
5 from the 27th day of June, 1910, at the rate of six per cent per annum.

Wherefore the said plaintiff demands judgment against the said defendant for the said sum of two thousand dollars, together with interest thereon at the rate of six per cent per annum from the 27th day of June, 1910, and the costs and disbursements of this action.

O. E. HOLMAN,
Attorney for Plaintiff, 410 *Globe Bldg.*,
St. Paul Minnesota.

(Duly verified.)

Endorsed: Filed May 20, 1911. Matt Jensen, Clerk. By G. A. Johnson, Deputy.

(Title of Cause.)

Amended Answer.

Now comes the defendant and for amended answer to the complaint in the above entitled action:

Admits that it is a corporation duly incorporated under the laws of the State of Connecticut; that formerly its corporate name was Hartford Life and Annuity Company.

Admits that at the time the contract or policy of insurance sued on was issued, the defendant's name was the Hartford Life and Annuity Insurance Company and that since said contract or policy was issued, the defendant has changed its name and is named the Hartford Life Insurance Company.

6 Admits that on the 4th day of April, 1885, the defendant executed and delivered to Hermann Ibs that certain contract or policy of insurance numbered 70627, but denies that the consideration for the issue of said policy or contract is fully set forth in the plaintiff's petition.

Admits that part of the consideration recited in said policy was the payment of $10.00 on each $1,000 in maximum indemnity provided for by said certificate, to be paid by said insured to create a Safety Fund, the payment of $3.00 per annum on each $1,000 of indemnity provided by said certificate, for expense dues, and the payment of all assessments levied against the insured to form a Mortuary Fund for the payment of all indemnity matured by deaths of members.

Admits that in and by said policy it was agreed that ninety days from the receipt by the defendant of satisfactory proof of the death of said Hermann Ibs there would be due and payable by the defendant out of said Mortuary Fund the maximum indemnity of $2,000 to the plaintiff.

Admits that plaintiff was the wife, and is now the widow, of Hermann Ibs.

Admits that the said Hermann Ibs died in Ramsey County, Minnesota, on the 27th day of June, 1910.

Admits that up to the time of his death the said Hermann Ibs had complied with all the conditions, stipulations and requirements in said contract on his part to be performed by him, except in the particulars hereinafter affirmatively pleaded.

7 Admits that since the death of Hermann Ibs the plaintiff has requested of defendant blank forms on which to make proofs of the death of Hermann Ibs; that defendant refused to furnish such blanks and disclaimed any liability under said certificate.

Admits that the Mortuary Fund referred to in said certificate, at the time of the death of said Hermann Ibs, and at all times since such death, has exceeded $2,000.

Denies that said sum of two thousand dollars ($2,000) is due from the defendant to the plaintiff.

Further answering:

Defendant alleges that on the 4th day of April, 1885, said Hermann Ibs made a written and signed application for the policy or certificate sued on herein, and that in said application the said Hermann Ibs agreed as follows:

"If I or my representatives shall omit or neglect to make any payment as required, in respect of amount, place and time of payment, by the condition of such certificate to be issued herein — shall be null and void, and all money paid thereon shall be forfeited to said company."

Defendant alleges that it received and accepted said application and on the faith of the agreement therein contained, as above set forth, issued the policy or certificate sued on herein, which expressly refers to and makes said application a part of said certificate or policy; and by the terms of said policy, it is expressly provided that it is issued in consideration of the

"Payment of $3.000 per annum on each $1,000 for expense dues, to be paid as hereinafter conditioned, and of the further payment of all assessments proportioned to the maximum indemnity herein provided for, levied against the herein named member to form a Mortuary Fund for the payment of all indemnity
8 matured by deaths of members, which assessments to be levied upon all the members in the department wherein this certificate is issued, whose certificates are in force at the dates of such deaths, shall be made according to the table of graduated assessment ratios given herein and as further determined by their respective ages and the aggregate maximum indemnity at the dates of such deaths, with due allowance for discontinuance of membership."

Defendant alleges that said certificate further provides:

"The member agrees to pay to said Company dues of three dollars per annum on each $1000 Indemnity, for expenses, on the first day of the month after date of issue hereof, and at every anniversary thereafter, so long as this Certificate shall remain in force; or by monthly or other pro rata installments of the same in advance for periods of less than a year. And also agrees to pay said Company, upon all certificates that shall mature by death, within thirty days from day on which notices bear date, all assessments determined as within set forth; the proceeds of which, after deducting ten cents on each assessment for cost of collection, shall form said Mortuary Fund."

Defendant alleges that in said policy it is expressly provided that the indemnity agreed to be paid shall be payable out of the Mortuary Fund so to be created by assessments as above set forth and not otherwise.

Defendant alleges that said policy further provides:

"The member further agrees and accepts this Certificate upon the express condition that if either the annual dues, assessments or safety fund deposit as hereinbefore required, are not paid to said Company on the day due, then this certificate shall be
9 null and void, and of no effect, and no person shall be entitled to damages or the recovery of any moneys paid for protection while the certificate was in force, either from said Company or the Trustee of the Safety Fund."

Defendant further alleges that said policy provides:

"A printed or written notice, directed to the address of the member, as it appears at the time on the books of the Company, and deposited in the post office at Hartford, or delivered by an agent of the Company, shall be deemed a legal and sufficient notice for all purposes hereof. A transcript of the books of said Company, *testified* by the Secretary, showing such facts, shall be taken and accepted

as conclusive evidence of the mailing of such notice, and of the facts aforesaid, as set forth in such transcript."

Defendant alleges that said Hermann Ibs elected to pay the dues of three dollars per annum for each $1,000 of indemnity quarterly in advance; and from time to time after the issuance of said certificate he paid his dues quarterly in advance and the Mortuary assessments which were levied against him quarterly until May, 1910.

Defendant alleges that on the 2nd day of May, 1910, the defendant duly made and levied against the said Hermann Ibs, under said policy, an assessment for the sum of thirty-three dollars and ninety-five cents; that said assessment was levied to form the Mortuary Fund for the payment of all indemnity matured by deaths; that said assessment was made according to the table of graduated mortality ratios given on said policy, that said assessment was proportioned to the maximum indemnity named in said certificate, was levied
10 against all the members holding similar certificates, and was determined by the ages of members and the aggregate indemnity at the dates of such deaths, with due allowance for the discontinuance of membership, and was made and levied in all respects as required by said policy.

Defendant alleges that notice of said assessment was duly given to the said Hermann Ibs, that the same was dated the 2nd day of May, 1910, and was deposited in the post office at Hartford on said date, directed to the address of said Hermann Ibs as it appeared on the books of the defendant at that time; that at the same time and in the same manner and by the same notice it demanded of said Hermann Ibs the payment of one dollar and fifty cents, the quarterly dues for the quarter ending with August 31, 1910; that notice of said assessment and of said dues was duly received by said Hermann Ibs, but that he failed to pay the same within thirty days from the day on which said notice bore date, that is to say, on or before June 1st, 1910; that the defendant extended the time for the payment of said assessment until June 5th, 1910.

Defendant further alleges that the said Hermann Ibs failed and neglected to pay the said mortality call and failed to pay said dues either on or before June 1, 1910, or on or before June 5, 1910, and payment of the same, or either of the same, was not tendered until after June 29, 1910; and that by the terms and provisions of said policy and application, the failure of said Hermann Ibs to
11 pay said assessment, as well as his failure to pay said dues, terminated said certificate or policy.

Defendant further alleges that the contract or certificate sued on is one of many similar certificates issued by the defendant to numerous other members of the Safety Fund Department, Men's Division, of the defendant Company; that each of said certificates provides, as does the certificate sued on, for the levy and collection of assessments, the proceeds of which are to constitute the Mortuary Fund referred to in the certificate sued on, from which, upon the death of the holder of any such certificate, the indemnity provided for therein is to be paid; that the indemnity provided for in each of said certificates is payable only out of said Mortuary Fund and

defendant is not otherwise liable for the indemnity provided for by said certificate; that under and by the terms of said certificates the defendant is the Trustee of said Mortuary Fund, that said certificates create an express trust as to such fund; members holding said several certificates, so long as they are in force, and the member continues alive (and after the death of the member, while the certificate is in force, the beneficiary designated therein) are the cestui que trustents of said Mortuary Fund; that said Mortuary Fund has always been maintained in the State of Connecticut, that said fund and the said trust under which it is held is subject to the control and direction of the courts of general jurisdiction of the State of Con-
12 necticut, and, particularly, of the Superior Court of New Haven County and the Supreme Court of Errors of the State of Connecticut; that the manner in which said Mortuary Fund and the trust under which it is held shall be administered, has been the subject of adjudication by the courts of general jurisdiction of the State of Connecticut, to-wit: By said Superior Court of New Haven County and the Supreme Court of Errors of the State of Connecticut, in the case of Charles A. Dresser, et al., v. Hartford Life Insurance Company, which said courts have jurisdiction over this defendant and over said fund, in which case said courts adjudicated and directed how the said Mortuary Fund should be administered; that a copy of the decrees and judgments of said Superior Court of New Haven County are hereto attached, marked respectively Exhibits "B" and "C," and the opinion of said Supreme Court of Errors of the State of Connecticut referred to in said decrees will be found reported in 80 Conn., 681, to which reference is hereby made; that said Mortuary Fund and the trust thereby created is being administered by the defendant strictly in accordance with the terms of said certificates and in accordance with the directions and adjudications of said courts of Connecticut, as shown by said decrees and opinion, that under the terms of said certificates and under the terms of said trust as construed and adjudicated by said courts the defendant is without authority to pay out of said Mortuary Fund the amount of any certificate of membership, where, as in the case of
13 Hermann Ibs, the member has failed or refused to pay the assessment levied against him to maintain said fund.

Wherefore, Defendant shows to the court that it is not liable to the plaintiff in this case; hence it prays to be discharged with its costs.

DURMENT, MOORE & SANBORN,
Attorneys for Defendant, 616-620 Germania Life Building, St. Paul, Minnesota.

(Duly verified.)

(Title of Cause.)

Reply.

Plaintiff for reply to the amended answer of the defendant alleges:

That she has not sufficient knowledge or information to form a belief as to the allegations of the said answer contained between line twenty-seven on the second page and line two on the third page of said answer.

Plaintiff admits that the said policy of insurance refers to the said application and makes said application a part of the said policy.

Plaintiff admits the allegations of said answer contained between line seven of the third page thereof and line eighteen of the fourth page thereof.

14 Plaintiff admits that the said Hermann Ibs from time to time after the issuance of said certificate, paid his dues and Mortuary assessments quarterly.

Plaintiff further admits, said notice of said pretended assessment was given to the said Hermann Ibs, that the same was dated the second day of May, 1910, and was deposited in the post office at Hartford on said date, directed to the address of said Hermann Ibs, as it appeared on the books of the defendant at that time; that at the same time and in the same manner and by the same notice, it demanded of said Hermann Ibs the payment of one and 50/100 ($1.50) dollars, the quarterly dues; that notice of said payment and of said dues was received by said Hermann Ibs and that he failed to pay the pretended dues and assessments prior to June 29th, 1910.

Plaintiff alleges that she has not sufficient knowledge or information to form a belief as to the allegations contained between the twenty-sixth line of the fifth pagge of the said answer and the fifth line of the seventh page thereof.

Except as herein admitted or qualified plaintiff denies each and every allegation contained in the said answer and every part thereof.

For further reply to the said answer plaintiff alleges:

That the said pretended assessment was excessive, unnecessary and unlawful.

That the said policy of insurance provides that all dues and assessments shall be paid within thirty days from the day on which

15 notices bear date. That nevertheless, the said defendant, for many years prior to the time of the death of the said insured, followed and permitted the custom and practice of accepting payments from the said insured after the expiration of such thirty days, and at irregular intervals, after the expiration of such thirty days, and that by said practices and custom said defendant encouraged the said insured in the belief that it would continue to accept payments of dues and assessments within a reasonable time after the expiration of such thirty days, and that thereby the said defendant waived strict compliance with, and performance of, the provisions of its policy of insurance requiring such

payment within thirty days from the day on which notice bear date, and that the said defendant is now estopped from alleging that the said insured was in default in the payment of said pretended dues and assessments, and plaintiff alleges that on the 29th day of June, 1910, she remitted to the said defendant the sum of thirty-five and 95/100 ($35.95) dollars in payment of the alleged and pretended assessment and dues referred to in said defendant's answer, and that the said sum of money was received by the said defendant not later than the first day of July, 1910, and retained by the said defendant in its possession until the 31st day of August, 1910, and plaintiff alleges that the said payment of the said alleged and pretended assessment was made within a reasonable time
16 after the expiration of the thirty days referred to in said policy, and in accordance with the practice and custom heretofore existing between the said defendant and the said insured.

Wherefore, plaintiff demands judgment as prayed for in her complaint.

O. E. HOLMAN,
Attorney for Plaintiff,
410-414 *Globe Building, St. Paul, Minnesota.*

(Duly verified.)

Verdict.

Court directed verdict for plaintiff, full amount, $2,268.32.

(Title of Cause.)

Notice of Motion for Judgment or New Trial.

Please take notice that at a Special Term of the above entitled Court, to be held at the Court House in St. Paul, Ramsey County, Minnesota, on Saturday morning, the seventh day of December, A. D. 1912, at ten (10) o'clock in the forenoon, or as soon thereafter as the matter will be heard, the Defendant, as provided by statute in such case may be done, will move the Court for Judgment notwithstanding the Verdict heretofore rendered in the above entitled action, or, in the event said motion is denied, for a New Trial thereof.

17 The ground upon which the defendant will ask for judgment is that the evidence does not sustain the verdict, and upon the evidence it appears defendant is entitled to judgment.

The grounds upon which defendant will ask for a new trial, in the event the Court denies the Motion for Judgment notwithstanding the verdict, are:

(1) That the verdict is not justified by the evidence, also that the verdict is contrary to law.

(2) Errors of law occurring at the trial and excepted to by the defendant.

Said motions will be made upon the minutes of the Court, and the files and records in said action.

DURMENT, MOORE & SANBORN,
Attorneys for Defendant.

Endorsed: Filed Dec. 3, 1912. Matt Jensen, Clerk, by G. A. Johnson, Deputy.

(Title of Cause.)

Order Denying Motion for Judgment or New Trial.

The defendant's motion for judgment notwithstanding the verdict or a new trial, came duly on for hearing on this 9th day of December, A. D., 1912. Messrs. Durment, Moore & Sanborn appeared for the defendant in support of the motion, and Mr. O. E. Holman for plaintiff opposed. Now, after hearing counsel for defendant and for plaintiff, and duly considering the matter, it is

Ordered, That said motion, and the whole thereof, be and
18 the same is denied.

Dated December 9th, 1912.

FREDERICK N. DICKSON,
District Judge.

Endorsed: Filed Dec. 9, 1912. Matt Jensen, Clerk, by G. P. Ritt, Deputy.

(Title of Cause.)

Notice of Appeal.

Please take notice that the defendant appeals to the Supreme Court of the State of Minnesota, from the order made in the above entitled action, on or about December 9th, 1912, denying its motion for judgment notwithstanding the verdict, or a new trial, and from the whole of said order.

Dated December 13th, 1912.

DURMENT, MOORE & SANBORN,
Attorneys for Defendant.

To the plaintiff above named, and to Mr. O. E. Holman, her attorney.

Endorsed: Filed Dec. 14, 1913. Matt Jensen, Clerk, by G. P. Ritt, Deputy.

(Title of Cause.)

Settled Case.

This case came on for trial before Hon. Frederick N. Dickson, J., with a jury on the morning of November 21, 1912. Mr. O. E.

Holman appeared on behalf of plaintiff, and Messrs. Durment, Moore & Sanborn and George F. Haid, Esq., on behalf of the defendants.

Jury empaneled and sworn.

Mr. DURMENT: Now, defendant claims the right to open
19 and close to the jury in this case. As I view it the only question on the pleadings is whether or not there was a default in paying this assessment and whether it was a valid legal assessment, and the burden is on the defendant to prove that it was a valid and legal assessment and that they were in default. If that is the situation, why, we have the right.

Mr. HOLMAN: I think we are entitled to open and close the case. The burden would undoubtedly be upon us to show a waiver and an estoppel—no question about that at all, that burden is upon us. The burden may be upon the defendant—I am not sure about that in this case—to prove the validity of its own assessment, and I am going to attack the validity of that assessment in my case, right in the outset.

The COURT: You are going to assume that burden, then?

Mr. HOLMAN: I am going to attempt to show that that assessment was an invalid assessment and unlawful. I am going to try this case just like I tried it before, for the very simple reason that the Supreme Court has said that that trial of this case makes out a prima facie case, under the evidence I propose to offer and the decision of the Supreme Court in this other action where they hold a prima facie case was made out and the court erred in dismissing the action.

The COURT: Well, I am going to rule that you have the opening and closing.

20 Exception by defendant.

Mr. DURMENT: Now, we move that the plaintiff be compelled to elect between the plea or the defense of an invalid assessment and the waiver. They are inconsistent.

Motion denied.

Exception by defendant.

Mr. Holman then opened on behalf of plaintiff, and offered in evidence plff's. Ex. A, being policy of insurance or certificate issued by defendant to Hermann Ibs on the 4th day of April, 1885, in the sum of $2000, the beneficiary named in the policy being the plaintiff, Eliza Ibs; and in connection therewith what is known as trustee's contract between defendant insurance company and the security company of Hartford, Connecticut. This includes everything on all sides of this certificate of insurance.

Received without objection.

Mr. HOLMAN: I now offer in evidence the following portions of the deposition of Thomas F. Lawrence, the secretary of the defendant insurance company, taken at Hartford, Connecticut, in August and September, 1911. And before I offer the deposition I wish to offer in evidence the following stipulation entered into at the time by plaintiff's and defendant's counsel appearing in the deposition:

"It is stipulated by and between the parties hereto that exhibits attached to this deposition which are copies of the original docu-

ments may be used at the trial of this case the same as originals without objection on the ground that the original is not attached to the deposition, unless at the time such copy is produced the original is demanded.

I read from page 13 of the deposition.

Q. What is the paper which I now hand you, Mr. Lawrence?

A. It is a copy of the notice of Call No. 127, due June 1, 1910, which was mailed from the office of the Hartford Life Insurance Company on May 2, 1910, addressed to Hermann Ibs, 105 Central Avenue, St. Paul, Minnesota, in connection with Certificate 70,627, issued on his life in the Men's Division of the Safety Fund Department of this Company.

Q. The notice itself being dated what day?

A. May 2, 1910.

Mr. HOLMAN: I offer in evidence notice issued by the Hartford Insurance Company to Hermann Ibs, dated May 2, 1910, being a notice of quarterly call No. 127, as testified to by Mr. Lawrence. This is marked Ex. B at the last trial and may so stand here.

Mr. DURMENT: It is the same thing as Ex. 7 to the deposition.

Ex. B read in evidence.

Mr. HOLMAN: I now read from page 14 of the deposition:

Q. What is the paper which I now hand you?

A. It is a copy of the second notice which was sent on June 9, 1910, by registered mail to Hermann Ibs, advising him that
22 the call due June 1st on certificate 70,627, of the Men's Division of the Safety Fund Department on his life, had not been paid and unless $35.95 (including fifty cents additional) was paid on or before June 20, 1910, his policy would be canceled.

Q. Was the original of this notice sent to Hermann Ibs on June 9, 1910?

A. It was.

Q. And the occasion for sending that was due to the fact that the assessment called for in the notice of May 2, which is Ex. No. 7, had not up to that time been paid?

A. That is true.

Mr. HOLMAN: I offer in evidence the second notice just referred to. It was originally marked Ex. D. It does not come in order, but it may be marked Ex. D. In connection with this second notice that I have just offered in evidence I will offer in evidence notice dated June 9, 1910. I will read further from the deposition:

Q. Now, with that notice of June 9th, which is Ex. 8 (in the deposition) was any other paper enclosed to Hermann Ibs?

A. Yes, sir, there was, a copy of the original notice with an addition of the registration fee of fifty cents.

Q. What is the paper which I now hand you?

A. That is a copy of the notice which accompanied the registered second notice of June 9th, which is Ex. No. 8.

Q. And it consists of a duplicate of the first notice with the
23 addition thereon in red ink of the words, "second notice" and "registration fee fifty cents."

A. Yes, sir.

Q. And that was sent with the registered letter notice dated une 9, 1910, which is Ex. 8?

A. It was.

Mr. HOLMAN: Now I offer in evidence notice dated June 9, 1910, marked as Ex. C, and in connection with that I also offer in evidence what is known as the second notice, dated May 2nd and which is a copy or duplicate of the notice already offered in evidence; and the notice dated June 9th may be marked Ex. C and the second notice may be marked Ex. D.

Mr. DURMENT: Ex. C is Ex. 8 of the deposition, and Ex. D is Ex. 9.

Mr. HOLMAN: It is stipulated between counsel that wherever the figure 2 appears before the number of the policy it is intended to indicate the amount of this particular policy.

I will read further from the deposition:

Q. What is the paper which I now hand you and which will be marked Ex. 10?

A. It is a copy of the list of members whose claims were included in quarterly call 127 due June 1, 1910.

Q. Was a copy of that sent to Hermann Ibs?

A. A copy of that was sent to Hermann Ibs on May, 2, 1910, with the notice of that call.

Q. Which is Ex. No. 7?

A. Which is Ex. No. 7.

Q. And how were Exhibits Nos. 8 and 9, being the
24 registered letter notice and the second notice of assessment which accompanied that notice, sent to Hermann Ibs?

A. By registered mail.

Q. And addressed to him at what address?

A. At 105 Central avenue, St. Paul, Minnesota, which was his address as it appeared on the books of the company at that time.

Mr. HOLMAN: Now I offer in evidence the list of 145 members sent to the insured on May 2, 1910, and received by the insured. This may be marked Ex. E, and is the same as Ex. 10 of the deposition. (Read to the jury.) I offer the following part of the deposition at the foot of page 5:

Q. In the policy issued in this case there is a provision which reads as follows: "The member agrees to pay to said company dues of $3 per annum on each one thousand dollars of indemnity, for expenses, on the first day of the month after the date of issue thereof, and at any anniversary thereafter, so long as this certificate shall remain in force; or by quarterly or other pro-rata installments of the same, in advance, for periods of less than a year." I would like to have you state what is the paper I now hand you and which will be marked Ex. 5.

A. The paper is a statement of the payments of dues upon certificate 70,627, which was issued in the Men's Division of the Safety Fund Department of the Company on the life of Hermann

Ibs. The statement shows in the first column the year, in the second column the day and month that the payment was
25 due, and in the third column the day and month on which the payment was actually made to the company, as shown by the books of the company.

Q. And that relates to the certificate or policy in suit issued to Hermann Ibs?

A. Yes, sir.

Q. And the tabulation as shown on this exhibit was prepared from your books and records in the office?

A. Yes, sir.

Q. And the figures in the last column show the dates when payments of dues on this policy in each year were paid to the company?

A. Yes, sir.

Mr. HOLMAN: I offer in evidence statement of the amount and times of payments of dues by the insured, which may be marked Ex. F.

Mr. DURMENT: And is Ex. 5 of the deposition.

Mr. HOLMAN: Now I read further from the deposition:

Q. What is the paper which I now hand you, and which will be marked Ex. 6?

A. This paper is a statement of the mortality calls or assessments paid on certificate 70,627 issued in the Men's Division of the Safety Fund Department of the Company on the life of Hermann Ibs. The statement shows the year in which the payments were made, the call numbers, the amount of the assessments, date of notice, the date that the assessment or call was due, and the date that it
26 was paid to the company as shown by the company's records.

Q. That statement was made up from your books and records?

A. It was.

Q. And that statement like the preceding statement relates to the policy issued to Hermann Ibs, which is sued on in this case?

A. It does.

Q. Do Exhibits 5 and 6 show all the payments either for dues or assessments that were ever paid by Hermann Ibs on policy sued on?

A. They do.

Mr. HOLMAN: I offer in evidence statement showing the payments of assessments by Hermann Ibs to the Insurance Company and the date of payment, which is Ex. 6 of the deposition and may be marked here Ex. G.

Recess until 2 P. M.

Mr. HOLMAN: I continue to read from the same deposition, on page 99:

Q. Please state whether the file which I now have in my hand consists of a copy of each notice sent to members of the Safety Fund Department, Men's Division, on each succeeding call, begin-

ning with call 81 and running down to and including call 127; Call 81 being dated November 1, 1898, and call 127 being dated May 2, 1910.

A. It does.

Q. And consists of a copy of each notice sent to the members of the Safety Fund Department, Men's Division, on each
27 successive call as originally printed but not containing the data which is to be inserted in the blanks left to designate the amount of assessments and dues?

A. It does.

Q. Call No. 81 in this file, which is dated November 1, 1898, and recites that the call is due December 1, 1898, reads as follows: "Payment will not be accepted later than December 5, 1898, unless residence is on or west of Meridian of Salt Lake, Utah, in which case payment will be accepted up to and including December 15, 1898.". Call No. 82, dated January 30, 1899, due March 1, 1899, reads precisely as above quoted except the first date in the quotation is March 5, 1899, and the last date is March 15, 1899. Call 83, dated May 2, 1899, due June 1, 1899, reads precisely as above except the first date in the quotation is June 5, 1899 and the last date is March 15, 1899. Call 84, dated August 2, 1899, due September 1, 1899, reads precisely as above except the first date in the quotation is September 5, 1899, and the last date is September 15, 1899. Call 85, dated November 1, 1899, due December 1, 1899, reads precisely as above except the first date in the quotation is December 5, 1899, and the last date is December 15, 1899. Call 86, dated January 30, 1900, due March 1, 1900, reads precisely as above, except the first date in the quotation is March 5, 1900, and the last date is March 15, 1900. Call 87, dated May 2, 1900, due June 1, 1900, reads precisely as above except the first date in the quotation is June 5, 1900 and the last date is June 15, 1900. Call 88,
28 dated August 2, 1900, due September 1, 1900, reads precisely as above except that the first date in the quotation is September 5, 1900, and the last date is September 15, 1900. Call 89, dated November 1, 1900, due December 1, 1900, reads precisely as above except the first date is December 5, 1900, and the last date is December 15, 1900. Call 90, dated January 30, 1901, due March 1, 1901, reads precisely as above except the first date is March 5, 1901, and the last date is March 15, 1901. Call 91, dated May 2, 1901, due June 1, 1901, reads precisely as above except the first date in the quotation is June 5, 1901, and the last date is June 15, 1901. Call 92, dated August 2, 1901, due September 1, 1901, reads precisely as above except the first date in the quotation is September 5, 1901, and the last date September 15, 1901. Call 93, dated November 1, 1901, due December 1, 1901, reads precisely as above except the first date in the quotation is December 5, 1901, and the last date is December 15, 1901. Call 94, dated January 30, 1902, due March 1, 1902, reads precisely as above except the first rate in the quotation is March 5, 1902, and the last date is March 15, 1902. Call 95, dated May 2, 1902, due June 1, 1902, reads precisely as above except the first date in the quotation is March 5, 1902, and

the last date is March 15, 1902. Call 95, dated May 2, 1902, due June 1, 1902, reads precisely as above except the first date in the quotation is June 5, 1902, and the last date is June 15, 1902. Call 96, dated August 2, 1902, due September 1, 1902, reads
29 precisely as above except the first date in the quotation is September 5, 1902, and the last date is September 15, 1902. Call 97, dated November 1, 1902, due December 1, 1902, reads precisely as above, except the first date in the quotation is December 5, 1902, and the last date is December 15, 1902. Call 98, dated January 30, 1903, due March 1, 1903, reads precisely as above except the first date in the quotation is March 5, 1903, and the last date is March 15, 1903. Call 99, dated May 2, 1903, due June 1, 1903. reads precisely as above except the first date in the quotation is June 5, 1903, and the last date is June 15, 1903. Call 100, dated August 2, 1903, due September 1, 1903, reads precisely as above except the first date in the quotation is September 5, 1903, and the last date is September 15, 1903. Call 101, dated November 1, 1903, due December 1, 1903, reads precisely as above except the first date in the quotation is December 5, 1903, and the last date is December 15, 1903. Call 102, dated January 30, 1904, due March 1, 1904, reads precisely as above except the first date in the quotation is March 5, 1904, and the last date is March 15, 1904. Call 103, dated May 2, 1904, due June 1, 1904, reads precisely as above except the first date in the quotation is June 5, 1904, and the last date is June 15, 1904. Call 104, dated August 2, 1904, due September 1, 1904, reads precisely as above except the first date in the quotation is September 5, 1904, and the last date is September 15, 1904.
30 Call 105, dated November 1, 1904, due December 1, 1904, reads precisely as above except the first date in the quotation is December 5, 1904, and the last date is December 15, 1904. Call 106, dated January 30, 1905, due March 1, 1905, reads precisely as above except the first date in the quotation is March 5, 1905, and the last date is March 15, 1905. Call 107, dated May 2, 1905, due June 1, 1905, reads precisely as above except the first date in the quotation is June 5, 1905, and the last date is June 15, 1905. Call 108, dated August 2, 1905, due September 1, 1905, reads precisely as above, except the first date in the quotation is September 5, 1905, and the last date is September 15, 1905. Call 109, dated November 1, 1905, due December 1, 1905, reads precisely as above except the first date in the quotation is December 5, 1905, and the last date is December 15, 1905. Call 110, dated January 30, 1906, due March 1, 1906, reads precisely as above except the first date in the quotation is March 5, 1906, and the last date is March 15, 1906. Call 111, dated May 2, 1906, due June 1, 1906, reads precisely as above except the first date in the quotation is June 5, 1906, and the last date is June 15, 1906. Call 112, dated August 2, 1906, due September 1, 1906, reads precisely as above except the first date in the quotation is September 5, 1906, and the last date is September 15, 1906. Call 113, dated November 1, 1906, due December 1, 1906, reads precisely as above except the first date in the quotation is

December 5, 1906, and the last date is December 15, 1906.
31 Call 114, dated January 30, 1907, due March 1, 1907, reads precisely as above except the first date in the quotation is March 5, 1907, and the last date is March 15, 1907. Call 115, dated May 2, 1907, due June 1, 1907, reads precisely as above, except the first date in the quotation is June 5, 1907, and the last date is June 15, 1907. Call 116, dated August 2, 1907, due September 1, 1907, reads precisely as above except the first date in the quotation is September 5, 1907, and the last date is September 15, 1907. Call 117, dated November 1, 1907, due December 1, 1907, reads precisely as above except the first date in the quotation is December 5, 1907, and the last date is December 15, 1907. Call 118, dated January 31, 1908, due March 1, 1908, reads precisely the same except the first date in the quotation is March 5, 1908, and the last date is March 15, 1908. Call 119, dated May 2, 1908, due June 1, 1908, reads precisely as above except the first date in the quotation is June 5, 1908, and the last date is June 15, 1908. Call 120, dated August 1, 1908, due September 1, 1908, reads precisely as above except the first date in the quotation is September 5, 1908, and the last date is September 15, 1908. Call 121, dated November 1, 1908, due December 1, 1908, reads precisely as above except the first date in the quotation is December 5, 1908, and the last date is December 15, 1908. Call 122, dated January 30, 1909, due March 1, 1909, reads precisely as above except the first date in the quotation is
32 March 5, 1909, and the last date is March 15, 1909. Call 123, dated May 1, 1909, due June 1, 1909, reads precisely as above except the first date in the quotation is June 5, 1909, and the last date is June 15, 1909. Call 124, dated August 2, 1909, due September 1, 1909, reads precisely as above except the first date in the quotation is September 5, 1909, and the last date is September 15, 1909. Call 125, dated November 1, 1909, due December 1, 1909, reads precisely as above except the first date in the quotation is December 5, 1909, and the last date is December 15, 1909. Call 126, dated January 29, 1910, due March 1, 1910, reads precisely as above except the first date in the quotation is March 5, 1910, and the last date is March 15, 1910. Call 127, dated May 2, 1910, due June 1, 1910, reads precisely as above except the first date in the quotation is June 5, 1910, and the last date is June 15, 1910.

Please state whether the foregoing is a true and correct copy of the matter referred to on each one of the notices beginning with No. 81 and running down to and including No. 127.

A. It is.

Q. And the special notice which provides for the fifteen-day extension, which is evidenced by Exhibits 33 and 34, likewise appears on each of those notices?

A. It does.

Mr. HOLMAN: Now, I want to offer in evidence the notices sent by the defendant, Hartford Life Insurance Company, to the insured, Hermann Ibs, beginning with the notices of quarterly Call
33 No. 86, to and including (all the intermediate calls) No. 126. These notices are notices sent by the Hartford Life

Insurance Company to the insured, and each of them marked paid on the respective dates on which they were paid, every notice is marked paid, and the date of payment is stamped on it.

Mr. DURMENT: I don't know exactly what counsel's theory or purpose of offering these is. There isn't any question but they were sent and paid. That is admitted in the pleadings.

Mr. HOLMAN: And received by the insured?

Mr. DURMENT: Yes. I say they were received by the insured. That is admitted in the pleadings, and they were paid. It seems to me they are immaterial.

Mr. HOLMAN: The purpose of this is to show that the defendant followed a practice and custom of sending out these notices during these ten years prior to this last Call 127.

The COURT: Showing the dates they received payments.

Mr. HOLMAN: And all the dates and the character of the call. These calls are all like the last call in phraseology, and it shows this custom.

Objected to as immaterial. The facts as stated by counsel are true.

The COURT: You admit they are authentic?

Mr. DURMENT: Well, I have not seen them. I have no doubt they are.

The exhibits were marked Ex. H-1 to Ex. H-40, inclusive.

The objection was overruled.

34 Exception by defendant.

Mr. DURMENT: We object to these at this time. Undoubtedly this dividend is the dividend from the Safety Fund income. I don't think there is any question about that.

Mr. HOLMAN: No other dividend occurs to me at this time except the accumulation of this Safety Fund and the income of the Safety Fund.

Mr. DURMENT: Well, if it is agreed, if it is understood that is where the dividend is from, I have no objection to it.

The COURT: Well, they will be received in evidence.

Mr. HOLMAN: I read from page 17 of the deposition:

Q. About what date did you receive the letter of Mrs. Hermann Ibs which is Ex. 13 (17).

A. It must have been on July 1st, possibly June 30th.

Mr. HOLMAN: I offer in evidence letter dated St. Paul, June 29, 1910, signed by Mrs. Hermann Ibs, not by Hermann Ibs, and addressed to the Hartford Life and Annuity Insurance Company, Hartford, Connecticut, being the letter just referred to in the deposition of Mr. Lawrence. It is agreed that a copy of that letter may be offered instead of the original. (Marked Ex. I and read in evidence.)

Q. What did you do on receipt of the letter of June 29th and which contained the money order which I have referred to?

A. The certificate, No. 70627, on the life of Hermann

35 Ibs, having already lapsed and cancelled in accordance with its terms, we wrote to Hermann Ibs to the effect that his

certificate had been cancelled and could only be reinstated after furnishing the company with satisfactory evidence of insurability, without expense to the company.

Q. And is the paper which I now hand you and which will be marked Ex. 21, a copy of the letter which you say you so wrote?

A. It is.

Q. Please state whether you got any answer to your letter of July 1st to Hermann Ibs, which is Ex. 21, prior to July 29, 1910.

A. We did not.

Mr. HOLMAN: I now offer in evidence letter dated July 1, 1910, addressed to Mr. Hermann Ibs, 105 Central avenue, St. Paul, Minn. (Marked Ex. J and read in evidence.)

Page 22 of the deposition:

Q. The next information which you received in connection with this policy was what?

A. The next communication with reference to this policy that the company received was a letter dated August 22, 1910, from O. E. Holman, attorney at law, St. Paul.

Mr. HOLMAN: I offer the letter in evidence. The original is attached to the deposition and I have a copy of it. (Marked Ex. K.)

Q. Did you make any response to that letter?

A. We did.

Q. And is this a copy of your response?

36 A. This paper is a copy of our response to Mr. Holman's letter of August 22nd; the response is dated August 31st, 1910.

Mr. HOLMAN: I offer in evidence letter from the defendant to myself, dated August 31, 1910. (Marked Plffs. Ex. L.)

Q. How many members approximately had you in the Men's Division of the Safety Fund Department in April and May, 1910?

A. Why, I should say about 13,000; I could verify that.

Q. I don't care for it any more particularly than that. How long approximately does it take you to make this calculation and prepare your records and get out and mail the notices for each assessment?

Objected to as immaterial.

Objection overruled.

Exception by defendant.

A. It takes an entire month. There is a tremendous amount of detail work connected with the getting out of an assessment. In the first place, to find out the amount of insurance there is in force at each age we have to make all our cancellations and reduce the amount of insurance that was in force.

Mr. HAID: It is "cancellations" here, but I think it should be "calculations."

Mr. HOLMAN: I guess "all our calculations," I should think that is what it would be; it appears in the deposition as "cancellations."

37 Mr. HAID: Well, we will agree, if you think it makes any difference.

Mr. HOLMAN: I don't think it makes any difference. "Calculations," I should think. Just change that to "calculations."

Q. Now, coming down to Call 127, I will get you to state whether you calculated the amount which would have been produced by an assessment by one rate upon each member of the Safety Fund Department of the Men's Division at his then attained age, at or about the time that that assessment was begun to be levied?

A. We did.

Q. And what was the date at which you began to prepare that assessment?

A. April 1, 1910.

Q. Just following March 31st?

A. Yes.

Q. And the assessment was based upon conditions and data ascertained as or about that date?

A. Yes, as of March 31st.

Q. Now, Mr. Lawrence, I will get you to tell me what the amount of mortuary fund on hand was on March 31st, 1910.

Mr. DURMENT: We object to that as incompetent and immaterial, and I wish to be heard on that proposition, your Honor, before the ruling is made.

The COURT: Very well.

Mr. DURMENT: Now, by way of explanation why I desire to be heard upon that, as I understand from what has taken place in this case before and from Mr. Holman's position, his contention
38 is that there was enough money in this mortuary fund—This refers to the mortuary fund, this question?

Mr. HOLMAN: Mortuary fund, yes.

Mr. DURMENT: —to pay Mr. Ibs and to pay, if not all, then at least a large portion of the death losses that had accrued on March 31st, and for that reason no assessment could properly be made on Mr. Ibs to cover all the death losses then outstanding, although he hadn't theretofore been assessed for them. Now, as I view it, this gets right down to the very foundation of this case. His proposition is—and for the purpose of this argument, why, I will not combat it, though I don't know that it is sound—but his proposition is this, that the mortuary fund should be exhausted before any assessment would be made to pay death claims, or it amounts to the same thing; in other words, the fund on hand in the mortuary fund, that is, the balance on hand in the mortuary fund must be applied to the payment of death losses which exist at any time before an assessment can be made for those losses. Now, there is no question—or will be in this case—upon the fact that so far as the mortuary fund is concerned it was not exhausted when they began to make this assessment, and perhaps not when they were finally paid it wasn't exhausted. It appears—will appear if we go further into it—that some of these deaths which are assessed for in this call had been paid out of the mortuary fund already. His theory, as I

understand it, is that the assessment must be made to pay an existing unpaid and unprovided for liability. Now, I want to
39 be heard on that proposition.

The objection was argued at some length by respective counsel in the absence of the jury, and the Court reserved the ruling.

Adjourned until the morning of November 22, 1912.

The COURT: The objection to the introduction of this evidence in reference to the condition of the mortuary fund at the time the assessment was made is overruled.

Exception by defendant.

A. On March 31, 1910, the mortuary balance on hand was $168,473.58 in the Men's Division of the Safety Fund Department.

Q. (P. 33:) Now, you have stated on Call No. 127 you assessed for death losses, for which an assessment had not theretofore been levied, to the aggregate of what amount?

A. $323,919.95.

Q. Of that sum and of those death losses for which an assessment was then levied how much had theretofore been paid from the mortuary fund?

Objected to as incompetent and immaterial.

Objection overruled.

Exception by defendant.

A. $198,994.19.

Q. And how much of such death losses ($323,919.95) were then unpaid?

Objected to as incompetent and immaterial.

Objection overruled.

40 Exception by defendant.

A. $124,925.76.

Q. Now, on March 31st, 1910, you levied assessment Call 127 to cover death losses amounting to $323,919.95, did you not?

A. We did.

Q. And on that date of those death losses which you covered by that assessment there had been in fact paid prior to March 31, 1910, the sum of $198,994.19; is that so?

A. That is so.

Q. Leaving therefore an unpaid balance of death losses for which you levied assessment 127 of $124,925.76?

A. That is right.

Q. And you had at the same time on deposit a balance in the mortuary fund amounting to $168,473.58?

A. That is right.

Q. (Page 82:) In the early history of your company you wrote legal reserve insurance only; is that not true?

Objected to as immaterial.

The COURT: What is the purpose of that testimony?

Mr. HOLMAN: To show the history of the company and the kind of business it transacts and to show that in 1899 this company ceased

to write assessment insurance, it violated the implied terms of its contract, it never wrote another policy on the assessment insurance plan, the result of which was to increase the assessments
41 against its membership, because it took no new life into the company, and it is what they have been doing.

The COURT: What is the question?

Mr. HOLMAN: That is to be followed by testimony——

The COURT: Followed by testimony that they adopted this plan and ran it for a while and then abandoned it and adopted some other plan?

Mr. HOLMAN: Yes.

The COURT: I think the evidence is immaterial and irrelevant.

Exception by plaintiff.

The answer which was excluded by the Court is as follows: "Yes, until 1879."

The COURT: They didn't abandon the plan so far as this man was concerned, they kept it up. Of course, if a corporation is organized to do one particular kind of business on one particular plan, it is its duty either to go forward or stop. But it appears that under the charter here they were allowed to do a life insurance business on all lawful plans. That is admitted, isn't it?

Mr. HOLMAN: Well, we haven't the charter in evidence.

Mr. DURMENT: The charter is here and that is true.

The COURT: They started out on this plan and they followed it for a certain length of time and then they abandoned it and started another plan, but as to those who were in under this assessment plan they continued—and are still continuing?

42 Mr. DURMENT: Still continuing, and there are some 13,000 members in it.

Mr. HOLMAN: They are still continuing to collect assessments but they are not continuing to write new insurance and get new membership. You see these companies, like every life insurance company, must have new blood in it; otherwise, as the members age, the assessments must become exorbitant.

The COURT: I don't think they contracted that they never would stop.

I will sustain the objection. I don't think it tends to show that this particular assessment was in any way illegal. Of course, that is the question here.

Mr. HOLMAN: I would like to get this into the record.

The COURT: Yes, put it in the record.

Mr. HOLMAN: I will have to offer that part of the deposition with the answers.

That part of the deposition referred to by Mr. Holman is as follows:

Q. When did you begin to write assessment insurance?
A. In 1880.
Q. How long did you continue to write assesment insurance?
A. Until 1899.
Q. After 1899 did you write any assessment insurance at all?
A. None whatever.

43 Q. Are you now writing level premium insurance only?

A. Exclusively, and have since 1899 when we ceased writing assessment insurance in the Safety Fund Department.

Q. And the legal reserve business is a larger portion of your business, is it not?

A. No, it is not.

Mr. HOLMAN: I would like to ask this question:

Q. How much of this assessment insurance was in force March, 1910?

Objected to as immaterial.
Objection overruled.

A. About $26,000,000 in the Men's Division.

Q. How much legal reserve business was then in force.

Objected to as immaterial.
Objection sustained.

The answer was as follows: "About $22,000,000."

Q. (Page 80:) This mortuary fund is absolutely in the control of the defendant and its officers, is it not?

A. Absolutely, subject to check.

Q. (P. 40:) Please state what was done with the proceeds of each assessment levied against each member of the Men's Division of the Safety Fund Department as it was received from time to time by the defendant company. To what fund did it go?

A. The proceeds of the assessment which was assessed for mortality went into the mortuary fund, all of it.

44 Q. And that fund was used for what purpose?

A. For the payment and settlement of death claims.

Q. And were the death claims of the Men's Division of the Safety Fund Department paid from the Mortuary Fund?

A. They were.

Q. The aggregate of the assessments collected by the defendant for the Men's Division of the Safety Fund Department have exceeded the amount that has been paid out from the Mortuary Fund, and what has become of the excess of such amounts of assessments over the death losses paid and where is that money?

Objected to as immaterial.
Objection overruled.
Exception by defendant.

A. In the mortuary fund.

Q. And applicable and has been used for the payment of death losses incurred in the Men's Division of the Safety Fund Department?

A. Yes, and for no other purpose.

Q. (P. 80:) I have asked you to furnish me a statement of expenses charged to the mortuary fund of the Men's Division of the Safety Fund. Ex. 48 purports to be a statement of the expenses paid out of the mortuary fund but does not cover any payments for death losses; is that not true?

A. That is true, only payments for the settlement of death losses.

Q. The aggregate of the expenses included in this statement is the sum of $37,791.38; no portion of that sum covers payments of death losses?

Objected to by defendant.
Objection sustained.

A. It does not cover the payment for death losses but payments for the settlement of death claims.

Mr. DURRENT: I would like to enter an objection to that question and answer. I think it is wholly immaterial.

Mr. HOLMAN: I will offer it and say nothing about it. As I understand your Honor's ruling at this time I am not going to say anything about this but I offer it.

Objection sustained.

On motion of Mr. Durrent the answer was stricken out, and plaintiff excepted to the ruling.

Mr. HOLMAN: Now I would like to offer this question:

Q. It covers specifically what expenses, what character of expenses?

Objected to as immaterial
Objection sustained.
Exception by plaintiff.
The answer to the question was as follows:

"Legal expenses."

Q. Attorney's fees?

Objected to as immaterial
Same ruling and exception.
The answer was as follows: "Attorney's fees, legal expenses for attorney's fees, and various legal expenses in connection with the settlement of death claims."

The plaintiff here rested.

46 Mr. DURRENT: If the Court please, we move that the case be dismissed for failure of the plaintiff to establish a cause of action. The only thing in the case upon which plaintiff can claim that he has made a prima facie case is upon the answer to his above was in the mortuary fund on the 31st day of March, 1910—which was a month before the assessment was actually levied, two months before it was collected—and he has not shown anything improper or illegal in the accumulation of that fund, nor has he shown in any way that this money belonged to the plaintiff.

The COURT: There is no testimony with reference to the safety fund.

Mr. HOLMAN: Well then I will have to offer that. I will just offer that testimony that I offered at the former trial.

The COURT: The case is reopened then.

Q. (P. 40:) Will you please state whether or not the Safety

Fund, Men's Division, has ever exceeded $1,000,000 of par value of the securities in which it was invested?

A. The Safety Fund of the Men's Division has never exceeded $1,000,000 par value of the funds in which it was invested.

Q. Can you tell us about when it was that the Safety Fund reached the limit prescribed for, to-wit, $1,000,000, of securities in which it was invested?

A. I can.

Q. About what date was it?

A. About the end of the year 1893.

47 Q. Subsequent to that time the defendant company received further contributions by members consisting of their payments, or parts of payments, stipulated in policies to be made to the Safety Fund, did it not?

Q. What, if any, funds did the defendant company receive from

Q. And what was done by the defendant company with such contributions for the safety fund after that fund reached the limit of $1,000,000?

A. The company sent those contributions to the Security Company, the trustee of the fund, exactly as it had before the fund reached its limit of $1,000,000.

Q. And after the fund so reached the limit of $1,000,000, what was done by the Security Company with the contributions towards the safety fund, those received by the defendant company from members subsequent to that time and by the defendant company in turn paid over to the Security Company?

A. After the fund reached its limit of $1,000,000, the Security Company returned to the Hartford Life Insurance Company, the defendant company, all contributions to the fund, at the same time that it paid the income of the fund to the defendant company.

Q. And if I understand you, after the Safety Fund reached $1,000,000, the Security Company in accounting to you for the earnings of the Safety Fund likewise accounted for and paid over to you the contributions received by it to that fund in excess of the $1,000,000?

48 A. That is correct.

Q. And they so accounted to you at the same time when they accounted to you for the interest earnings or other increments of the fund?

A. Yes.

Mr. DURMENT: Before he closes his case we desire to read some on this subject.

Mr. HOLMAN: The plaintiff objects to any further testimony, any other part of the deposition being read by defendant at this time.

Objection overruled.

Exception by plaintiff.

Mr. DURMENT: This is on page 38 (reading:)

Q. Referring to the provision of the policy in suit, or the credit as against his assessments of dividends paid by the safety fund in the Men's Division of the company, I will ask you if from time to time the company collected from Ibs and from other members of

the Men's Division of the Safety Fund Department the sum of $10 which according to the provision of the contract is to go into the safety fund?

A. It did.

Q. And what was done with those $10 payments that this company received from time to time from such members?

A. In accordance with the terms of the Trustee's Contract, they were sent to the Trustee, the Security Company, of Hartford.

Q. Was all such money in fact paid over to the Security Company as trustee?

A. Every cent of it.

49 Q. What is the paper which I now hand you and which will be marked Ex. 35—a tabulation of what?

Mr. HOLMAN: That is objected to as not cross-examination.

Objection overruled.

Exception by plaintiff.

A. It is a tabulation of the receipts from members on account of their deposits to the Safety Fund, by years, and of the amounts deposited with the Surety Company on account of deposits received from members for the Safety Fund, by years.

Q. The first column showing the years of such receipts and disbursements, the second column showing the amount received by the defendant company from members of the Men's Division of the Safety Fund Department for deposit with the Security Company as trustee, and the third column showing the amount deposited year by year with the Security Company as trustee?

A. Yes.

Q. What, if any, funds did the defendant company receive from the Security Company as the income or increment from the Safety Fund and what did the defendant company do with the amounts thus received by it as an increase or increment from the Safety Fund?

A. The defendant company received from the Security Company the net interest and increment on the Safety Fund of the Men's Division, and the money so received was credited in the form of dividends in the reduction of assessments on cer-

50 tificates in the Men's Division of the Safety Fund Department, which, under the terms of the trustee's contract, were entitled to participate in these dividends.

Q. Is the paper which I now hand you and which will be marked Ex. 36 a statement of the receipts and disbursements of the income of the Safety Fund as received by the defendant company from the Security Company and as disbursed by it in the main to members by way of dividends?

A. It is.

Q. The first column showing the year of such receipts and disbursements, the second column showing the amounts which the defendant company received from the Security Company, and the third column showing the amounts which were disbursed year by year; is that correct?

A. That is correct.

Q. And the amount of disbursements shown in the last column of Ex. 36 is the aggregate year by year of the several amounts that were paid to each member of the Safety Fund Department Men's Division, by credit in reduction of his assessments as paid from time to time?

A. It is.

Mr. DURMENT: Now I offer in evidence Ex. 35, which is the tabulated receipts from members on account of their deposit to the Safety Fund by years, and of the amount deposited with the Security Company on account of the deposits received from members to the Safety Fund by years.

Objected to as a matter of defense.

51 Objection overruled.

Mr. DURMENT: Also Ex. 36, which shows the amount which the defendant received from the Security Company, the trustee, and the amount which was disbursed by it year by year in the way of dividends. (Said Exhibits 35 and 36 were identified on the trial as Deft's Ex. 1 and 2.)

Q. What was the total amount of the payments made by Hermann Ibs to the Safety Fund on his policy in suit, being for $2,000 of insurance?

Objected to as not cross-examination.

Question withdrawn because admitted by the pleadings that he paid twenty dollars.

Q. How much was repaid to him in the way of dividends and applied as a credit upon the amount of assessments levied against him from time to time?

Objected to as not proper cross-examination.

Objection overruled.

Question withdrawn.

Q. Is the amount of each credit and the time of such credit and the aggregate thereof as set forth in the paper which I now hand you and which will be marked Ex. 37?

A. It is.

Q. (P. 78:) On January 1, 1910, is it not a fact that the par pose of making this question intelligible, simply as showing that it refers to Hermann Ibs.

Q. What was the total amount of the payments made by Hermann Ibs to the Safety Fund on his policy in suit, being for $2,000 of insurance?

52 A. Twenty dollars.

Q. How much was repaid to him in the way of dividends and applied as a credit upon the amount of assessments levied against him from time to time?

A. $52.46.

Q. Is the amount of each credit and the time of such credit and

the aggregate thereof as set forth in the paper which I now hand you and which will be marked Ex. 37?

A. It is.

Mr. DURMENT: We offer Ex. 37.

The COURT: It will be received.

Said exhibit was identified on the trial as Deft's. Ex. 3.

Q. (P. 74:) What is the amount of the income, by years, paid by the Security Company to the defendant company as the income of the Safety Fund Deposit with the Security Company? Did you prepare a statement showing that income by years and is this the paper marked Ex. 36?

A. We did, and it is.

Q. This is a correct statement?

A. It is.

Q. The second column shows the net income turned over to your company?

A. The second column shows the entire amount received by us from the Security Company. It includes not only the net income but the deposits to the fund after the fund reached its limit of $1,000,000 par value.

Q. It shows the amount turned over to your company in
53 these different years after deducting the compensation of the Trustee?

A. That is the actual amount received by us.

Q. And that total amount is $1,076,484.53, is it not?

A. It is.

Q. You had on hand on March 31, 1910, of this income which had not been applied in the payment of dividends the sum of $2,997.25, did you not?

A. We had that balance on hand in the dividend account.

Q. (P. 78:) On January 1, 1910, is it not a fact that the par value of the securities held by the Securities Company in the Safety Fund Department, Men's Division, amounted to the sum of $989,451.88, and that the cost of these securities was the sum of $1,038,639.19, and that on January 1, 1911, the par of the securities of the Safety Fund, Men's Division, was the sum of $995,194.49, and that the cost of these securities at that time was the sum of $1,040,722.35?

It is stipulated that the securities on the respective dates above mentioned were in the amounts above mentioned in the preceding question, both as to the par and the cost of the securities.

Q. (P. 110:) You have stated in answer to Mr. Holman's question that the balance on hand in the dividend account March 31, 1910—and by that dividend account I refer to the dividend account of the Safety Fund Department, Men's Division, of course,—of
54 $2997.25, and I will get you to state whether or not that balance consisted of an unapportioned balance in that account, or whether it was the sum or amounts apportioned to members which had not as yet been used by them in the payment of their

assessments but was then in that account, subject to their use, on the payment of the next succeeding call and as a credit thereon.

A. That balance was not an unapportioned balance but was a balance that had been apportioned to members who had not used it in reduction of their assessments but was standing apportioned to their credit, to be used when their payments were made.

Q. (P. 7:) Were there at any time any other payments to the company either for dues or assessments than as shown on these Exhibits 5 and 6?

A. There were not while the certificate was in force.

Q. And barring the tender of one payment which was sent to the company on June 29, 1910, after it is claimed the certificate or policy sued on lapsed, and about which I will interrogate you later, were there any other payments made or tendered to the company for dues or assessments on this policy?

A. There were not.

Q. I wish you would describe, Mr. Lawrence, in a general way, how assessments are calculated in the Men's Division of the Safety Fund Department, and then after you have so described it I
55 will have you give me the details about Call No. 127.

Objected to as being a matter of defense, not proper cross-examination, and immaterial.

The COURT: Well, I will refuse to hear it at this time, on the ground that it isn't proper cross-examination.

Exception by defendant.

The answer excluded was as follows: "We make an accurate calculation and find the exact amount which will be produced by the assessment of one rate as illustrated in the table of graduated assessment rates on the back of the certificate, at the attained age of each member whose certificate is in force. This sum is then divided into the amount of death claims which accrued in the quarter and which are outstanding. To find the amount that each individual member should be assessed we multiply the rate for the individual member's age as illustrated on his certificate by the quotient above described. This gives the amount that the individual member should pay at his attained age per thousand dollars of indemnity. In making this calculation as to the amount which will be produced by the assessment of one table rate upon all of the certificates in force, we make an allowance for discontinuance of membership as provided in the contract."

Q. (P. 9:) Now, having ascertained the gross amount that will be produced by an assessment of one rate upon all members of the department, what do you do with respect to lapsation or the
56 discontinuance of membership?

Same objection, ruling and exception as last above.

The answer excluded is as follows: "We make an allowance for that as provided in the contract as all of the certificates that are in force at the time we calculate the assessments will not make the payments of that assessment. We have to assume a lapse rate and we base our assumption of that lapse rate or dis-

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continuance of membership rate on the actual discontinuance of membership on the previous call. If on the previous call there was a lapse of two per cent, we would assume a lapse of two per cent and take only 98 per cent of the amount that would be raised by the assessment of one table rate upon all the insurance in force as the amount to be divided into the amount of death losses outstanding."

Q. (P. 29:) From that did you make an allowance for discontinuance or lapse, and if so what percentage of allowance did you make and what was the amount of such percentage of allowance?

Mr. HOLMAN: That is objected to for the same reasons.
Objection sustained.
Exception by defendant.

The answer excluded is as follows: "We did make an allowance for that discontinuance of membership of 2.76, which amounted to $2,187.53."

Q. (P. 59:) In levying any assessment you paid no
57 attention whatever to the amount collected on the preceding assessment?

A. I cannot answer that question without going into an explanation.

Q. What is the explanation?

Mr. HOLMAN: That is objected to for the same reasons, and also objected to on the ground it is incompetent and calling for a conclusion.

The COURT: Well, this objection as to not being proper cross-examination is sustained.
Exception by defendant.

The answer excluded is as follows: "As I have before stated, our books do not show the actual aggregate amount received on any particular call. We do, however, in levying a call take account of the number of members who have paid the preceding call and the number of members who have lapsed for the non-payment of that call as the lapse rate used in determining the ratio of any call as the actual lapse rate on preceding call, the lapse rate being the lapse of insurance in force."

Recess until 2 P. M.

Q. (P. 42:) State whether in apportioning to the members the dividends on their policies you apportioned to them the full amount which you received from the Security Company and thereby apportioned not only the interest and earnings of the fund, but the contributions to the fund which were made after the fund reached $1,000,000.

A. We did.

Q. (P. 54:) In your testimony yesterday you referred to the distribution of money which you received from the Security
58 Company by way of dividends, to members of the Safety Fund Department; how often in each year did the Security

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Company make payments to the Hartford Life Insurance Company of the increase or interest on the Safety Fund, and together therewith when the Fund reached $1,000,000 par value the contributions to that fund in excess of $1,000,000, and how often did the Hartford Life Insurance Company make an apportionment or distribution of the funds so received by way of dividends to members?

A. The Security Company paid the Hartford Life Insurance Company semi-annually the net income on the Safety Fund and all deposits to the Fund which were made after the Fund reached the limit of $1,000,000 par value. The Hartford Life Insurance Company distributed these payments of the Security Company to the certificate holders semi-annually in the form of dividends in the reduction of the assessments due the first of March and the first of September in each and every year.

Q. And that would be in the first assessment after you received the remittance from the Security Company?

A. Yes, sir.

Q. The first assessment calculated and the first assessment received after you received payment from the Security Company?

A. Yes, sir.

Q. You received the money semi-annually and you distributed it semi-annually?

A. Yes, sir.

59 Q. (P. 12:) How often do you levy assessments in relation to the Safety Fund Department?

A. Quarterly.

Q. And those notices of assessment bear what date?

A. Bear date of thirty days prior to the date that the call is due. Our assessments are levied quarterly, as I stated, and are due on the first days of March, June, September and December in each year.

Q. And those notices are dated and sent out approximately the first day of February, May, August and November of each year?

A. Yes, sir.

Q. And I use the term approximately because they are sent out thirty days in advance of the date on which they are due; they might be dated the 2nd of the months of February, May, August or November, or even the 3d, or in some instances a day or two within the end of the preceeding months that I have mentioned?

A. That is right.

Q. Now, those assessments being dated on that day, which is approximately as I have stated, the first days of February, May, August and November, state whether they are mailed on the days when they are dated.

A. The notices are mailed on the days they are dated.

Q. Now, then, having stated that it takes thirty days to prepare the assessements and the notices of assessments, as you have described, the data on which the assessment is levied is begun

60 to be prepared approximately thirty days in advance of the date on which the notices bear date?

A. That is true.

Q. So that the assessment is begun to be prepared for the purpose of levying approximately on the first days of January, April, July and October of each year; is that correct?

A. That is true.

Q. It might start a day or two before that, or it might start a day or two after the 1st day of each month?

A. It might.

Q. And it is necessary to thus start the preparation of this assessment, calculate it from data, thirty days in advance of the notice because of the impossibility of doing all of that work and complete it on the day of the notice?

A. It would be absolutely impossible to do otherwise.

Q. (P. 15:) What is the paper which I now hand you?

A. It is a receipt for the registered letter which was sent to Hermann Ibs June 9th, containing the registered letter notice Ex. 8.

(Receipt marked for identification No. 11.)

Q. And that is the customary postoffice department register card which is returned when a registered letter is sent out?

A. It is.

Q. Is the paper which I now hand you and which will be
61 attached hereto, marked Ex. 12, a copy of that receipt?

A. Yes.

Q. It stands admitted on the pleadings, Mr. Lawrence, that Hermann Ibs died June 27, 1910. Will you please state whether prior to June 27, 1910, the defendant company ever received from Hermann Ibs or from anyone for him the amount of Call No. 127, which is the mortuary call, notice dated May 2, 1910, the amount of which mortuary call is $33.95, or any part thereof.

A. It did not.

Q. State whether or not at any time prior to June 27, 1910, the defendant company ever received the quarterly dues of $1.50 or any part thereof.

A. It did not.

Q. (P. 17:) Please state whether Ex. 14, being the second notice of call 127, with the registration fee endorsed thereon, is itself the original paper which was enclosed to Hermann Ibs with the registered letter notice dated June 9, 1910, which is Ex. 8.

A. It is.

Q. And it comes into your possession by having been enclosed and returned to you with the letter from Mrs. Ibs; is that correct?

A. That is true.

Q. (P. 20:) This address of Hermann Ibs, 105 Central avenue, St. Paul, Minnesota, is the same address as appeared upon the books of your company for several years past, is it not?

A. It is.

62 Q. On the receipt by the defendant of Ex. 13, being the letter of June 29, 1910, and the papers which accompanied that which you say included a postoffice money order for $35.95, state whether or not the money order was used by you; by which I

mean whether it was deposited in the bank or collected by the defendant company.

A. It was not used by the company.

Q. Did you on that day, July 29th, write the letter, a copy of which I am now handing you, and which will be marked Ex. 22, and please state whether that is the carbon copy of the letter which you wrote to Hermann Ibs on that day, which was made at the same time that the original letter was written?

A. It is; that carbon copy was made at the same time as the original letter which was written to Hermann Ibs on the 29th day of July, 1910.

Objected to as not proper cross-examination.

Objection overruled.

Q. How was that letter sent to Hermann Ibs?

A. That letter was sent by registered mail.

Q. And what is the paper which I now hand you?

A. It is a postoffice receipt from the United States postoffice at Hartford, Connecticut for a registered letter addressed to Hermann Ibs at St. Paul, Minnesota, and dated July 30, 1910.

Q. And it is the receipt for the letter which you have just identified as Ex. 22?

A. It is.

Q. What is the paper which I now hand you and which
63 will be marked Ex. 24?

A. It is the original of the letter of which Ex. 22 is a copy. This is the original letter which was sent by registered mail to Hermann Ibs in St. Paul on July 29, 1910.

Q. What is the paper which I now hand you?

A. It is the envelope in which the letter of July 29, 1910, Ex. No. 24, was mailed to Hermann Ibs and which was returned by the postoffice at Hartford as the registered letter could not be delivered.

Q. And this is the original registered letter of July 29th, which you wrote to Hermann Ibs, which is Ex. 24, and the envelope in which it was enclosed, being Ex. No. 25. And after the letter had been written and registered as you have testified, it was returned to you by the postoffice department, and that is how they came back into your possession?

A. That is how they are in our possession.

Q. Did the defendant ever receive any further communication from either Hermann Ibs or Mrs. Hermann Ibs?

A. It did not.

Mr. Durment: Now, we offer in evidence Ex. 23 to the deposition, which is the registered receipt for this letter, the letter itself, and the envelope in which it was contained. (Read to the jury.)

Q. (P.32:) Now please proceed and state to us the amount of death losses incurred or theretofore unassessed for, then state the amount of death losses that were assessed for on Call 127,
64 and then state the amount of death claims unassessed for at that time, referring always, unless otherwise specified, to the Men's Division of the Safety Fund Department.

A. On March 31, 1910, there were incurred death losses which had not been previously assessed for, $540,000. Call No. 127 included death losses amounting to $323,919.95. Of the death losses incurred but theretofore unassessed for on March 31, 1910, there was $216,080.05 of death losses which were not included in Call 127.

Q. Now, of the $540,000 of death losses which had been incurred on March 31, 1910, which were up to that time unassessed for, had any portion of those been paid out of the mortuary fund of this association of the Men's Department?

A. Yes.

Q. How much?

A. $200,333.33.

Q. What was the amount of death losses theretofore incurred and theretofore unassessed for which were unpaid?

A. On March 31st there were unpaid death losses amounting to $339,666.67.

Mr. DURMENT: I am not offering these three questions that I read now, because they are already in and went in over my objection, but for the sake of making the record clear, at Mr. Holman's request, I will read them:

Q. Now, you have stated on Call No. 127 you assessed for death losses, for which an assessment had not theretofore been
65 levied, to the aggregate of what amount?

A. $323,919.95.

Q. Of that sum and of those death losses for which an assessment was then levied, how much had theretofore been paid from the mortuary fund?

A. $198,994.19.

Q. And how much of such death losses ($323,919.95) were then unpaid?

A. $124,925.76.

Mr. DURMENT: From here on I am offering, myself.

Q. What were the death losses which were incurred in the Men's Division of the Safety Fund Department subsequent to March 31 and between that date and April 30th?

Objected to as immaterial, incompetent and irrelevant, not cross-examination.

Objection sustained as not cross-examination.

Exception by defendant.

Mr. DURMENT: We offer to show the amount remaining in the mortuary fund on the 2nd of May, at the time this assessment became an assessment, as we claim, the date of the notice and the amount of unassessed for claims against the fund on that date, and the amount of unpaid unassessed-for claims at that date by the deposition here in connection with what plaintiff's counsel has offered in evidence.

Objected to as not proper cross-examination.

Sustained. Exception by defendant.

Q. (P. 62:) Assuming that your statement of the amount
66 of death losses on March 31, 1910, which you have stated was $540,000, is correct, the fact nevertheless is that on that day there was unpaid of those death losses the sum of $339,666.67, and no greater amount?

A. That is correct, there were unpaid death losses on that date of $339,666.67.

Q. The fact is also on that date you had on hand in cash in your mortuary fund an unexpended sum of $168,473.58?

A. That is true.

Q. And that fund was applicable to the payment of those death losses which had been incurred on the 31st day of March, 1910?

A. Applicable for the payment of death losses in the Men's Division of the Safety Fund department.

Q. There was nothing to prevent the company from using that $168,473.58 in the payment of the death losses which were due and unpaid on the 31st day of March, 1910, was there, or such portion thereof as that balance would cover?

A. I cannot answer that yes or no. I think that undoubtedly there was a reason why the company could not apply this balance then in the mortuary fund to the death losses included in Call 127 which at that time were outstanding.

Q. That fund of $168,473.58 was deposited to the credit of the defendant company in the banks in this city or elsewhere, subject to check, was it not?

A. It was.

67 Q. Were there on the 31st day of March, 1910, matured contracts due and payable on that day to the extent of the mortuary balance? I mean death losses of which proper proof of claim had been furnished and which were then payable?

A. Of the $540,000 of death losses which were outstanding March 31, 1910, a part represented death losses on which the company had received proofs of death and on which the claims had been approved, but which were not yet due; also death losses in process of adjustment and not yet due, and also death losses reported, but no proofs received and not yet due. I cannot state the separate amounts under those three heads.

Q. (P. 66:) At that time the company had on deposit in banks a cash balance in the mortuary fund of $168,473.58; is that not correct? I refer to March 31, 1910.

A. It is.

Q. That balance in the mortuary fund was subject to check by the officers of the company?

A. It was.

Q. And it was within the discretion of the officers of the company as to whether they would then use the whole or a portion of that mortuary balance in payment of a part of these unpaid death losses which had been approved on the 31st day of March, 1910?

A. It was in their best judgment as to the benefit of the membership to so use the mortuary balance that no claims would come due

by reason of the ninety days expiring before June 1st, the
68 date when the next call would come in, with no money on hand, with no balance on hand in the mortuary fund to pay these claims.

Q. (P. 70:) Were there any unpaid assessments or calls in course of collection on March 31, 1910?

A. There were not.

Mr. Holman offered the following:

Q. (P. 65:) Of the $540,000 of death losses on March 31, 1910, to which you have referred, what amount had been proved up properly and allowed by the company at that time?

Mr. DURMENT: We object to that as immaterial.

Mr. HOLMAN: I offer to show that on that date $402,000 of this $540,000 had been approved by the company.

Objection overruled.

Exception by defendant.

A. Of that $540,000 of death losses proofs had been received in connection with death losses amounting to $402,000, and those claims have been paid.

Q. Now, of that amount you had paid prior to March 31st the sum of $200,333.33?

Objected to as immaterial.

Objection overruled.

A. Yes.

Q. Had proof of loss been furnished as to any other part of the $540,000 of death losses?

Objected to as immaterial

Overruled.

Exception by defendant.

A. The condition of the balance of the $540,000 of death
69 losses was, $75,000 of them no proofs whatever had been received; in connection with the other $63,000, the papers had not been completed. These claims were in process of adjustment.

Q. On March 31, 1910, it appears from what you have just testified to that there was an unpaid balance of death losses of which proofs had been received and which had been approved by the company of $201,666.67; is that not correct?

A. That is correct.

Q. At that time the company had on deposit in banks a cash balance in the mortuary fund of $168,473.58; is that not correct? I refer to March 31, 1910.

A. It is.

Q. (P. 68:) It is true, then, that of the death losses for which call 127 was levied, $318,919.95 was included in and was a part of the $402,000 for which proofs had been received and which had been approved by the company; that is correct, is it not?

A. It is.

Q. If I am correct in my figuring, it appears, then, that $83,000.95 of the total amount of approved death losses which you have stated to have been $402,000, was not assessed for in your call 127?

A. That is right.

Q. (P. 69:) On March 31, 1910, you have stated unassessed death losses amounted to $540,000?

A. That is right.

Q. But you reported to the policy holders the death losses
70 amounted only to $323,919.95; that is, in sending out notice of this call 127 you included notice of death losses amounting to that sum only and did not report to them the balance of the death losses which were then really unassessed for; is that not so?

A. We reported to them in the list of death claims which accompanied the notice of that call only the death losses which were included in that call which amounted to $323,919.95. The balance of this was assessed for at a subsequent date and the policy holders were given notice of the deaths with the notice of the assessments which it included.

Q. (P. 104:) This morning you were asked by Mr. Holman whether if you took the $168,000 plus, on hand in the mortuary fund March 31, 1910, and applied it so far as it would go to the $201,666.67 of approved death claims, whether the balance of approved death claims then left on hand would have been only $33,193.09, and your answer was that that was so. What would have been the balance of the outstanding unpaid death claims on that date which were then reported to the company?

A. $138,000.

Q. Those death claims aggregating $138,000 had not been formally approved?

A. They had not.

Mr. Durment then offered the following:

Q. (P. 68:) Why did you not include that $83,000 in your call
127 when it appears that proofs had been furnished, that is,
71 claims to that amount had been approved by the officers of the company?

Objected to by Mr. Holman as calling for a conclusion, as not cross-examination and as immaterial.

Overruled.

A. The mortality in any class of insured lives varies from period to period. For a long period we would get an average mortality in the class, but for short periods the mortality would vary. In one quarter there might be a very high mortality and in the next quarter a very low mortality. In the case of some few calls in the past the officers of the company in their best judgment, for the best interest of the certificate-holders, carried over some death claims from one quarter into the next quarter, where there has been a heavy mortality in the quarter, to make the assessments as nearly uniform as possible. If one assessment is $15, by reason of a low mortality,

and the next assessment was $10 by reason of a high mortality, the lack of solidarity in amount might work a hardship on a great many of the members and necessitate their dropping their insurance.

Q. Did you pursue the same policy in levying prior assessments and in levying subsequent assessments that you have just referred to, prior and subsequent to 127?

A. I said that it had been done in some few cases where conditions seemed to warrant the officers in doing so, in their best judgment.

Q. (P. 79.) There was over $200,000 of death losses that were unpassed for on March 31, 1910, that were not included in Call 127 and that you kept back for subsequent calls; is that not so?

A. Of the $500,000 of death losses unpassed for on March 31, 1910, $256,000.25 was not included in call 127.

Q. (P. 105.) State whether or not they represented deaths which had occurred, notice of which had been given, and whether or not in many instances the only thing that was lacking was the formal approval for payment.

A. That amount does represent unpaid death losses on that date which had actually occurred and for which the company had received notice, and in many cases the only thing lacking was the company's formal approval.

Q. Now, deaths occur, of course, from day to day?

A. They do?

Q. And notices of such deaths come in to you from day to day?

A. They do?

Q. And the approval to which you refer consists of an affidavit made by the beneficiary and attending physician, undertaker and possibly a near friend, the purpose of which form of affidavit is to assure the company that the member is actually dead; is that not right?

A. That is right.

Q. And when you say that claims were not approved, or that claims were in process of adjustment, you mean that the formal approvals either have not been furnished or have not been completed or, if completed, there are some mistakes, errors or omissions which are from time to time required to be supplied by the claimants; is that right?

A. That is right.

Q. And those death claims then on hand on March 31st in addition to the $53,000 plus which had been approved were being approved day by day as those proofs were either furnished or completed?

A. They were.

Q. Please state what call 127, which was prepared on the conditions as they existed on March 31, 1910, and notice of which went out May 2, 1910, was known to be received by the company.

A. About the 1st of June.

Q. And when would the bulk of that amount that would be paid on that call come into the coffers of the company?

A. Between the 1st and the 15th of June.

Q. Now, please state whether or not many of the claims included in the $402,000 which were approved on that date had already been approved for some days.

A. They undoubtedly had been approved, some of them for several days, fifteen or twenty days, or a month, perhaps.

Q. So that part of the ninety days within which you are privileged to withhold payment had already expired as to these approved claims?

A. Yes.

74 Q. And as to those claims, as well as to the $138,000 of claims which had been formally approved, the death of the member had occurred and the notice of his death had been given necessarily some considerable time before that date?

A. Yes.

Q. Now, please state whether or not it has been the custom and practice of the company to make payment of death losses just as quickly as they could do, in the exercise of good business judgment, after the claim has been established, and to disregard the privilege contained in the policy to withhold payment for ninety days.

A. It has.

Mr. HOLMAN: Following the last question, I want to offer this part of the deposition:

Q. Now, in answer to Mr. Holman's question on this same subject you said that on that day you assessed the membership for a total of $323,919.95 and that it was absolutely necessary to do so. Will you please explain fully why it was necessary to levy that assessment on that day and for that amount?

A. It was absolutely necessary to levy that assessment to replenish the mortuary fund so that the mortuary fund would be able to meet the demands which would be made upon it between that date and September 1st, which would be the next succeeding date on which a call would become due.

By Mr. DURMENT:

Q. That would be a period of how long?

A. That would be a period of five months from March 31st
75 and three months from June 1st, the date that call 127 was due.

Q. And that results because your assessments are levied only quarterly?

A. Yes.

Q. And assessments have only been levied quarterly ever since the insured in this case became a member of the association?

A. They have always been levied quarterly since he became a member of the association.

Q. Go ahead with your explanation why it was necessary.

A. If we had depleted the mortuary fund by paying all of the balance of the approved claims outstanding on March 31st unless

we had levied the assessment there would have been no money coming into that fund until September 1st. We had on March 31st outstanding death losses amounting to $138,000 over and above the approved claims. We would have had $138,000 of death losses if we had depleted the mortuary fund to pay all of the approved claims. Completed proofs of death on those were apt to come into the office every day and were coming in every day. It might be some of those claims would be approved because said papers were received on April 1st. Under the contract we would have been compelled to pay these claims ninety days from receipt of said proofs of death, which would have been on July 1st, and if there had been no money in the mortuary fund on that date those claims would not have been paid, the company would have defaulted in its payments and the
76 Men's Division of the Safety Fund Department would have been wound up by the terms of the Trustee's contract. In addition to these death losses of $138,000 that would have been outstanding March 31st if the mortuary fund had been used to pay all the approved claims we received, we were sure to incur death losses in April and in May. We could not tell what those losses would be; we knew about what the average would be, and those losses coming in in April would probably be approved, and the ninety-day limitation expired on the majority before September 1st, and the same would be true in May. It was therefore necessary to replenish the mortuary fund by that assessment as of March 31st, as otherwise the company could not have made its demands upon its mortuary fund.

Plaintiff rests.

Mr. DURMENT: We now renew our motion to dismiss.

Motion denied.

Exception by defendant.

Case opened on behalf of defendant by Mr. Durment.

Mr. DURMENT: We offer in evidence, your Honor, what is Ex. 1 to Mr. Lawrence's deposition; it is the charter of this company. This is a certified copy of it. (Marked at the trial Def't's Ex. 7.)

I offer in evidence Ex. 8, certified copy of the judgment
77 in the New Haven Superior Court.

Mr. HOLMAN: That is objected to as incompetent, irrelevant and immaterial, no foundation laid; it appears from the papers that neither the plaintiff nor the insured was a party to the action; it appears from the paper offered that the cause of action there stated is not this cause of action.

The COURT: What is the purpose of this?

Mr. DURMENT: The purpose is this your Honor: This is a Connecticut corporation; it appears already in evidence, if not, we will show it by the deposition later, that this mortuary fund is kept in Connecticut, and our contention is that it is in the hands of this company, subject to a trust, to pay these claims, the claims against it; that the company has been carried into court in its own jurisdiction, where this fund is, in a lawsuit brought by a number of certificate holders against the defendant and others, to determine their

right to the mortuary fund, and their rights and obligations under this contract, and these judgments have adjudicated and determined that matter, and this company is bound by them and bound to administer that fund in accordance therewith.

The COURT: You mean they are Connecticut contracts and this is the law of Connecticut which is in this contract?

Mr. DURMENT: Not only that, but further than that, this is a suit here not for personal judgment against this defendant; this is a suit to recover $2,000 out of a certain fund. Now, that fund is maintained under the law of Connecticut and under Connecticut contracts and is located in Connecticut, and the trustee of this defend-
78 ant company is in Connecticut, and the funds of this company are subject to the control of the Connecticut courts in respect to that.

The COURT: This is not a decision of the court of last resort?

Mr. HOLMAN: No, just a county court.

Mr. DURMENT: No, it is made in pursuance of its order.

Mr. HOLMAN: Not order.

Mr. DURMENT: No, but there are certain features of it that are— It went to a court of appeals, a court of last resort, and the finding of the lower court was modified to some extent.

Mr. HOLMAN: No, no, there was a demurrer to the complaint, and that demurrer was sustained by the court below, went up to the Supreme Court and the court below was reversed, it was sent back for trial, and it was then tried by the New Haven court, and this decision was rendered in the lower court and never went any higher.

Mr. DURMENT: But it is a court of competent jurisdiction which had jurisdiction of the fund and defendant.

Mr. HOLMAN: That is disputed.

The COURT: Well, do you want to be heard on that?

Mr. HOLMAN: I do.

The COURT: Well, I will hear you Monday morning.

Adjourned until Monday, November 25, 1912, at 10 A. M.

79 Mr. DURMENT: When court adjourned we had offered in evidence a certified copy of the decree and presented it to the Court, and before urging that I desire to offer in evidence from the general statutes of Connecticut the revision of 1902, in force July 1, 1902, the Constitution of the United States, and the Constitution of the State of Connecticut (published by the authority of the State, the Hartford Press is the publisher,) the case of Lockwood v. Brainerd & Co., 1902. From that I desire to offer Section 1 of Article V of the Connecticut Constitution.

Mr. HOLMAN: Objected to as incompetent, irrelevant, immaterial and no foundation laid.

Mr. DURMENT (reading): "The judicial power of the state shall be vested in a supreme court of errors, a supreme court, and such inferior courts as the General Assembly shall, from time to time, ordain and establish; the powers and jurisdiction of which courts shall be defined by law."

And Sections 535 and 536 of the provision itself, on page 207 of this publication.

Mr. HOLMAN: Same objection. All this testimony may be taken subject to my objection.

Mr. DURMENT (reading):

"SECTION 535. All civil actions for equitable relief only, or for legal relief only, wherein the matter in demand exceeds $500 and does not exceed $1,000, and all civil actions for both equitable and legal relief, wherein the equitable and legal relief severally and distinctly demanded exceeds $500 and does not exceed $1,000, may be brought either to the superior court or to the court
80 of common pleas, provided that said actions which are within the territorial jurisdiction of the district court of Waterbury may be brought either to that court or to the superior court."

"SECTION 536. All civil actions wherein the relief, legal or equitable, severally and distinctly demanded, exceeds $1,000, shall be brought to the superior court, but civil actions in Fairfield county, in which the relief demanded as aforesaid exceeds $500 and does not exceed $2,000, including therein appeals from the doings of commissioners in insolvent estates, may be brought or taken to the superior court or to the court of common pleas."

Now, your Honor, in connection with these statutes that I have read, we renew our offer as to the decisions.

Mr. HOLMAN: I renew the objection that I made on Friday afternoon to the offer of the judgment.

The COURT: Just what is this decision?

After Mr. Durment's statement the Court said:

I don't think the question involved in that case was the question in this case. I don't think the decision in that case even settles the law of Connecticut in this case. I think the objection to this ought to be sustained, and I will sustain it.

Mr. DURMENT: An exception to the ruling, and among other reasons for it, I want it to appear in the record that it is (the ruling) in violation of Article IV, Section 1, of the Constitution of
81 the United States requiring "full faith and credit," and also Article I, Section 10, which prohibits the state from making any law "impairing the obligation of contracts," and also of the Fourteenth Amendment which prohibits depriving one of property without due process of law.

We offer in evidence Ex. 9, which is a certified copy of the decree of the Superior Court of New Haven county, Connecticut—judgment signed by Shumway.

Mr. HOLMAN: Same objection to this offer as I made to the other.

Same ruling and exception.

Mr. DURMENT: Now one thing that I want to make clear—I suppose that probably Mr. Holman will be willing to admit that—and it is that this Safety Fund, Men's Division, was a separate and distinct thing from the Safety Fund, Women's Division.

The COURT: Mr. Holman does not claim that this surplus in

the mortuary fund, of which he has given evidence here, belonged to anything more or anything else than the Men's Division.

Mr. HOLMAN: Men's Division, not the Women's Division at all.

The COURT: You claim that, too?

Mr. HOLMAN: Yes, both claim that.

The COURT: Why can't it be admitted on the record then?

Mr. DURMENT: I claim, however, the right to show that the Women's Division is an entirely separate and distinct thing, under a separate and different contract, and has nothing whatever
82 to do with the Men's Department, so-called, nor with this contract which we have offered in evidence, so there can be no possible question both as to the fund and as to the making of assessments.

Mr. HOLMAN: Why, I don't see why I can't admit that. I am willing to admit that this defendant had another department of insurance, known as the Women's Division, and it had a policy in that department, it had a mortuary fund in that department; it had a safety fund in that department; and that that Women's Division was entirely separate and distinct from the Men's Division of the Safety Fund Department; that the two were in no way connected, and that all the evidence in this case up to this point relates wholly and entirely to the Men's Division and no portion to the Women's Division of the Safety Fund Department.

Mr. DURMENT: And that the Women's Division——

Mr. HOLMAN: Was conducted separately——

Mr. DURMENT: And under a separate and distinct contract as to the Safety Fund——

Mr. HOLMAN: Yes.

Mr. DURMENT: And with a different safety fund from the fund in evidence——

Mr. HOLMAN: Yes, the two were not connected at all.

Mr. Durment then offered the following from the deposition of Mr. Lawrence:

Q. I wish you would describe, Mr. Lawrence, in a general way, how assessments are calculated in the Men's Division of the
83 Safety Fund Department, and then after you have so described it I will have you give me the details about call No. 127.

A. We make an accurate calculation and find the exact amount which will be produced by the assessment of one rate as illustrated in the table of graduated assessment rates on the back of the certificate, at the attained age of each member whose certificate is in force. This sum is then divided into the amount of death claims which accrued in the quarter and which are outstanding. To find the amount that each individual member should be assessed we multiply the rate for the individual member's age as illustrated on his certificate by the quotient above described. This gives the amount that the individual member should pay at his attained age per thousand dollars of indemnity. In making this calculation as to the amount which will be produced by the assessment of one

table rate upon all of the certificates in force, we make an allowance for discontinuance of membership as provided in the contract.

Q. You have stated in answer to that question that you first make an accurate calculation of the amount which will be produced by an assessment of one rate; I understand that the table of rates on the back of your policy provides a varying rate of assessment at each age; is that correct?

A. From age twenty-one to age sixty-five.

Q. Now, you would have at those various ages a large and a varying amount of insurance in force at each assessment?

84 A. That is true.

Q. And how do you ascertain the amount which an assessment at one rate, as shown by the tables, will produce at a given age?

A. We find how much indemnity is in force at that particular age at the time of the assessment. We then multiply the rate for that age by the number of thousands of indemnity outstanding at that age, and the result is the amount which will be raised by the assessment at one table rate at that given age.

Q. By the term "indemnity" you mean the amount of insurance in force at that age?

A. Yes.

Q. Having multiplied that one rate by the number of thousands of insurance in force at that age, you get the amount of assessment of one rate at that age; is that correct?

A. It is.

Q. And having pursued that process with respect to each age, that is to say, having multiplied the number of thousands of insurance in force at each age by the rate applicable at that age, how do you get the total amount that will be produced by one assessment of one rate on all members of all ages in the department?

A. By adding together the amount that will be produced by the assessment of one rate at each of the ages of the table.

Q. Now, having ascertained the gross amount that will be produced by an assessment of one rate upon all members of the department, what do you do with respect to lapsation or the dis-

85 continuance of membership?

A. We make an allowance for that as provided in the contract as all of the certificates that are in force at the time we calculate the assessments will not make the payments of that assessment. We have to assume a lapse rate and we base our assumption of that lapse rate or discontinuance of membership rate on the actual discontinuance of membership on the previous call. If on the previous call there was a lapse of two per cent, we would assume a lapse of two per cent and take only ninety-eight per cent of the amount that would be raised by the assessment of one table rate upon all the insurance in force as the amount to be divided into the amount of death losses outstanding.

Q. That is to say, the gross amount which you find will be produced as the result of one assessment of one rate upon all the members is reduced by this assumed rate or ratio of lapsation?

A. Yes, sir.

Q. Now, then, if the amount for which you propose to levy the assessment, that is to say, the aggregate amount of death losses for which the assessment is levied or on which the assessment is levied, is greater than the amount that will be produced by an assessment of one rate upon all of the members in the manner in which you describe, how do you increase the amount of one rate so as to produce the amount for which the assessment is levied?

86 A. We find how many times one table rate will be necessary to have paid to raise a sufficient amount to pay the amount of death losses, by dividing the amount that will be raised by the assessment of one table rate into the amount of the death losses.

Q. And you divide the amount that will be raised by one assessment at one table rate into the amount of death losses that you have after allowing the assumed rate?

A. Yes.

Q. And when you have thus ascertained the ratio or the number of times one rate for which you have to levy the assessment, how is the amount apportioned to each member as his particular part of that assessment on any given assessment that you levy, and what is the process by which he is advised of the amount of his assessment?

A. We multiply the table rate at the attained age of an individual member by the number of times the amount that will be raised by the assessment of one table rate on the entire amount of insurance in force must be paid to raise the amount of the death losses.

Q. That so-called number of times you term your ratio, do you not? That is your technical term for it, and the word "ratio" as you have used it in this deposition indicates the number of times one rate, which is the method of calculating the amount which has to be paid to the mortuary calls?

A. That is right. The ratio is the number of times the rate
87 which it is necessary for each member to pay in order to make up the full sum of death claims.

Q. For which the assessment is levied?

A. For which the assessment is levied.

Q. Now, how is the member advised of the amount of his assessment?

A. The member is advised of the amount of his assessment by a notice mailed to him thirty days in advance of the date that the assessment is due.

Q. And prior to that notice being sent to him is the amount of each assessment levied against each member recorded on your books?

A. It is, yes. After the ratio has been determined we make a separate calculation for every individual certificate holder of the amount that he must pay, multiplying his table rate at his attained age by the ratio per thousand of insurance, enter that amount on our certificate registers, and that amount is then drawn off on to the notice, which is mailed to each one of the individual members.

Q. And with such notice do you send also a list of the deaths for which the assessment is levied?

A. We do.

Q. And that notice and list of deaths is sent to each member how?

A. It is sent by mail.

Q. (P. 12.) In respect to each age?

A. In respect to each age. After the ratio has been determined we have to make an individual calculation for each member
88 as to the amount that he is assessed for per one thousand dollars of indemnity and multiply that by the number of thousands of indemnity in force on his life; after that is done the amount of payments has to be copied on to a notice and that notice enclosed in a stamped envelope, together with a list of deaths for which the assessment is made, preparatory to mailing.

Q. (P. 29.) Now, as I understood you this morning, your first process in levying an assessment was to ascertain the amount of an assessment at one rate, and you have just stated that you did so ascertain the amount of assessment at one rate at the attained age of each member of the Safety Fund Department; I will now get you to state what the amount of an assessment by one rate levied against each member of the Safety Fund Department at an attained age aggregated.

A. It aggregated $79,258.48.

Mr. DURMENT: I will read two or three preceding questions which are already in, so your Honor will get the connection—and the jury.

Q. Now, coming down to Call 127, I will get you to state whether you calculated the amount which would have been produced by an assessment by one rate upon each member of the Safety Fund Department of the Men's Division at his then attained age, at or about the time that that assessment was begun to be levied.

A. We did.

Q. And what was the date at which you began to prepare that assessment.

89 A. April 1, 1910.

Just following March 31st?

A. Yes.

Q. And the assessment was based upon conditions and data ascertained as or about that date?

A. Yes, as of March 31st.

Mr. DURMENT: Now, that much was read by Mr. Holman, and and is already in. Now, the next question I have read. Shall I read it again to get it in here?

The COURT: Read it again.

Q. Now, as I understood you this morning, your first process in levying an assessment was to ascertain the amount of an assessment at one rate, and you have just stated that you did so ascertain the amount of assessment at one rate at the attained age of each member of the Safety Fund Department; I will now get you to state what the amount of an assessment by one rate levied against each member of the Safety Fund Department at an attained age aggregated.

A. It aggregated $79,258.48.

Q. From that did you make an allowance for discontinuance or lapse, and if so what percentage of allowance did you make and what was the amount of such percentage of allowance?

A. We did make an allowance for that discontinuance of membership of 2.76, which amounted to $2,187.53.

Q. Did you then deduct that allowance for discontinuance of lapse of $2,187.53 from the $79,258.48?

90 A. We did.

Q. And that gave you what result in figures?

A. $77,070.95.

Q. And that figure, $77,070.95, was the product of one assessment of the ratio of one after making the allowance for lapsation or discontinuance of membership of 2.76 per cent. Now, then, the death losses for which that assessment was levied or enumerated, as I understand it, was in the list of death losses which is already an exhibit in this case and marked Ex. 10.

A. It was.

Q. And the aggregate amount of death losses as shown by Ex. 10 was what sum?

A. $323,919.95.

Q. And as one assessment at one rate or one ratio would only produce $77,070.95, in order to ascertain the number of times that amount which you would have to realize in order to provide for death claims aggregating $323,919.95, you divided $77,070.95 into $323,919.95, and that gave you a quotient or ratio of how much?

A. The actual result of that division was 4.202 plus.

Q. What was the ratio or quotient actually used?

A. The ratio actually used was 4.20.

Q. And that means that you assessed each member of the Men's Division of the Safety Fund Department 4.2 times the amount of one rate as shown by his policy?

A. Yes.

91 Q. Now, is that detail that you have gone through set forth in figures in the paper which I now hand you and which will be marked Ex. 29?

A. It is.

Q. And was the assessment of 4.2 times the amount of the policy rate for his then attained age, levied against each member of the Men's Division of the Safety Fund Department at the same time? That is to say, by a notice dated May 2, 1910?

A. Yes.

Mr. DURMENT: We offer in evidence Ex. 29. (Marked on the trial Ex. 10.)

Q. Will you please state how, using that ratio of 4.20, it was determined that the assessment or mortuary call No. 127, levied against Hermann Ibs, was $33.95?

A. According to the application, Ex. No. 2, Hermann Ibs was forty-six years old when this policy was issued April 4, 1885; therefore at the time that Call 127 was levied he was over age sixty-five and would be assessed at the rate for age sixty-five. The rate for that age is illustrated in the table on the certificate as $4. Multiplying this rate $4 by the ratio 4.20, you get a result of $16.80, which would be the amount of the assessment on this certificate for $1,000

of insurance. The certificate was for the face amount of $2,000 and we multiplied this by two which gives the result of $33.60. To this is added 35 cents, the amount that we charge for taxes, being required by the state of Minnesota, and by its laws we are obliged to pay a tax upon this assessment if collected. This makes the total $33.95.

92 Q. Irrespective of the dues?

A. Irrespective of the dues as shown in Ex. 7.

Q. I understand you to say that the state of Minnesota does impose and does collect from you a tax upon your premiums or assessments collected from your members in that state?

A. It does.

Q. And upon all assessments or premiums collected by you in the state of Minnesota you do make a report to the Insurance Department and you do pay the tax on the premiums assessed and collected in that state?

A. We do.

Q. And this 35 cents which was added to and became part of the mortuary call 127, as explained by you in your previous answers, was added to the mortuary call pursuant to this provision of policy which I shall now read: "It is further agreed that this certificate shall be charged with any and all amounts that may be owing from the member * * * and that in case the laws of any county, state or municipality in which the member or his beneficiary may reside shall require a tax to be paid by said company on account of any moneys collected thereon, said member agrees to pay the amount of such tax to said company in addition to the payments hereinbefore named, as part of the payments needed to hold this certificate in force either in connection with the payments of assessments and annual dues or otherwise, as said company may from time to time elect." Is that the case?

93 A. It is.

Q. Please state whether it is now the practice of the company of the Safety Fund Department of the Men's Division and was the practice in the case of Hermann Ibs to charge these taxes as a part of each assessment and thereby have the amount of taxes on hand when they were required to pay them over to the state.

A. It was.

Q. And you only collected the amount of tax on each assessment and did not collect for any taxes in advance?

A. That is true.

Q. Now, please proceed and state to us the amount of death losses incurred or theretofore unassessed for, then state the amount of death losses that were assessed for on call 127, and then state the amount of death claims unassessed for at that time, referring always, unless otherwise specified, to the Men's Division of the Safety Fund Department.

A. On March 31, 1910, there were incurred death losses which had not been previously assessed for, $540,000. Call No. 127 included death losses amounting to $323,919.95. Of the death losses

incurred but theretofore unassessed for on March 31, 1910, there was $216,080.05 of death losses which were not included in Call 127.

Q. Now, of the $540,000 of death losses which had been incurred on March 31, 1910, which were up to that time unassessed for, had any portion of those been paid out of the mortuary fund of
94 this association of the Men's Department?

A. Yes.

Q. How much?

A. $200,333.33.

Q. What was the amount of death losses theretofore incurred and theretofore unassessed for which were unpaid?

A. On March 31st there were unpaid death losses amounting to $339,666.67.

Q. What were the death losses which were incurred in the Men's Division of the Safety Fund Department subsequent to March 31st and between that date and April 30th?

A. $99,000.

Mr. HOLMAN: I object to this as immaterial.

Overruled.

Exception by plaintiff.

Q. On April 30th, what was the balance of your mortuary fund of the Men's Division Safety Fund Department?

A. $89,371.87.

Q. Please state the death losses incurred or theretofore unassessed for prior to the levying of call No. 127 on April 30th?

A. $639,000.

Q. Now, call No. 127 went out immediately after April 30th, or on May 2nd, 1910?

A. It did.

Q. And the amount of death losses on which that call was based was $323,919.95?

A. It was.

Q. Now, what was the aggregate of death losses then on
95 hand which had been incurred but were then wholly unassessed for except as they were included in call No. 127?

A. $315,080.05.

Q. Of the death losses theretofore unassessed for, the aggregate of which you have stated was $639,000, you had paid prior to April 30, 1910, how much?

A. $303,333.33.

Q. And there was unpaid on that date how much?

A. 335,666.67.

Q. Now, of the death losses included in call No. 127, amounting to $323,919.95, you had paid on or prior to April 30th, how much?

A. $282,419.95.

Q. And the balance of death losses included in call 127 which were unpaid on that date amounted to about how much?

A. They amounted to $41,500.

Q. Now, Mr. Lawrence, the figures which you have just given us which relate respectively to March 31, 1910, and April 30, 1910,

appear in the tabulation thereof which will be attached thereto marked Ex. 30?

A. They do.

Court here took a recess until 2 P. M.

Mr. DURMENT: We offer Ex. 11 in evidence.

Q. The Safety Fund of the Men's Division of the Safety Fund Department is in whose custody?

A. The Safety Fund is in the custody of the trustee of
96 the fund, the Security Company of Hartford.

Q. And that trustee is located in the city of Hartford, state of Connecticut, and the fund maintained in the city of Hartford, state of Connecticut?

A. Yes.

Q. Now, the mortuary fund is a fund from which your death losses are paid, is it not?

A. It is.

Q. And who has the custody of that fund and the balance in that fund from time to time?

A. The Hartford Life Insurance Company.

Q. And it maintains that fund in the city of Hartford, state of Connecticut?

A. Yes, the money composing the fund is deposited in various banks.

Q. Now, when in these statements you have given the amount of mortuary balance, that indicates the amount of the mortuary fund which remained in your hands on those dates after you had paid out of these — such death claims and other charges as were paid out of that fund?

A. Yes.

Q. And those balances on the several dates which you have given them represent all of the mortuary fund and the full amount of the mortuary fund then in the possession of the defendant company?

A. That is true.

Q. What was the monthly average rate of death losses in
97 the association during the first six months of 1910?

A. Something a little over $100,000.

Q. What was the average of the four previous mortuary calls? I mean mortuary calls previous to No. 127.

A. About $315,000.

Q. Each call averaged about $315,000?

A. That is right.

Q. (P. 44:) In your testimony yesterday you spoke about the assumption of lapse. You gave us the percentage which was assumed in the calculation of call 127. I wish you would explain briefly why there is any necessity of assuming a lapse on each call.

A. If we did not assume a lapse on each call we would raise on each assessment less than the amount assessed for.

Q. It is inevitable, is it not, that there should be some lapse on each call?

A. Absolutely so; our assessment is based on conditions as they existed two months prior to the day the assessment is due. It is absolutely inevitable that some members whose certificates were in force two months prior, before they came due would lapse and not pay that call, or die, or in some way be canceled.

Q. Either continue to live and refuse to pay, or die or in some way not pay their assessment?

A. That is right.

Q. What is this book now before you?

A. That is a book which is kept in the Actuary's depart-
90 ment from which the calculations of the rates and various calls are made.

Q. Does that show in detail the calculation of an assessment at one rate by which you arrived at the figures $79,250.40, which you gave as a total amount of an assessment of one policy rate on each member of the Safety Fund Department, at his attained age on call 127?

A. It does.

Q. And the paper which I now hand you and which will be marked Ex. 38 is an exact copy of the calculation of call 127 with the exception of the third column, which shows the number of policies in force at each age, is it not?

A. It is.

It is stipulated between the counsel that the third column referred to in the answer of the witness just given contains the number of policies in force at each age, and is non-essential and need not be copied in the copy of the book, which copy is Ex. 38.

Mr. DUNNAWAY: We offer Ex. 38. (Marked on this trial Ex. 12.)

Q. The first page of this exhibit, Mr. Lawrence, as I understand it, refers only to that class of policies which you designate as Original Assessment Policies, as contradistinguished from what will hereafter be referred to as Form 3, 3½ and Form 4; is that correct?

A. That is correct, that refers only to the policies which have the original lower table of rates.

99 Q. And included in that class of policies is the policy which is sued on in this case?

A. That is true.

Q. The second column is the rate applicable at the attained age or at the age of the member when this assessment was levied, as shown by the table of rates applicable to that form of policy, or what you have termed the original or lower table of rates; is that correct?

A. That is correct.

Q. And the third column shows the aggregate amount of in surance in force at each of the several ages set forth in the first column; is that correct?

A. That is correct.

Q. And the fourth column, which is headed "Product" is the re sult of multiplying the rate shown in the first column, being the

rate of assessment per thousand, by the number of thousands of insurance or indemnity in force at that age as shown by the basic column?

A. That is right.

Q. And those products are the products of an assessment of one rate as shown by the original assessment policies, by the table applicable to those policies?

A. They are.

Q. And the sum of those several products which appears as the balance, $60,000,000, is the aggregate amount that would be produced by an assessment of one rate at the attained age of all of the members of the Safety Fund Department holding policies (30) which you have described as the original assessment policies?

A. That is right.

Q. Page 3 shows the calculation made for Call #27 of one rate level against all of the policies in the Safety Fund Department of the Men's Division who held what are known as your Form 3 policies?

A. That is right.

Q. And the calculations proceeds in the same method as to Form 3 policies which you have just described as the method of calculation of your original assessment policies?

A. That is right.

Q. And the calculation is made separate and involves a calculation of different factors because of the different and generally higher rate applicable to your Form 3 policies?

A. That is right.

Q. The third page is a similar calculation made in a similar manner as to your Form 5 policies, is it not?

A. Yes.

Q. And is again a separate calculation in the same manner but involving different amounts and therefore necessarily a different and separate calculation because of the difference in the rate applicable to those policies, the rates being as shown in the second column of page 3 of Ex. 30; is that correct?

A. That is correct.

Q. Now, page 4, exclusive of the recapitulation which appears at the bottom, is a calculation by a similar method using the (31) rate applicable to that class of policies of an assessment of one rate, by the table applicable to what you refer to as Form 7½ policies, is that correct?

A. It is.

Q. And the products as shown by the four pages of the exhibit to which you have just referred are recapitulated at the end of the fourth page, and give the total of $19,230.00, which is the amount of an assessment of one rate on all of the several forms of policies in the Safety Fund Department of the Men's Division as you worked it out and as shown by the figures given in Ex. 30?

A. That is right.

Q. (P. 31:) What was the total amount of that assessment (32) as levied?

A. The assessment was $323,919.95.

Q. Was that the aggregate amount of the assessment?

A. That was the amount of the death claims for which we assessed.

Q. And you assessed against certificate holders that amount of money to cover those death losses?

A. Yes.

Q. (P. 59:) In levying any assessment you paid no attention whatever to the amount collected on the preceding assessment?

A. I cannot answer that question without going into an explanation.

Q. What is the explanation?

A. As I have before stated, our books do not show the actual aggregate amount received on any particular call. We do,
102 however, in levying a call take account of the number of members who have paid the preceding call and the number of members who have lapsed for the non-payment of that call as the lapse rate used in determining the ratio of any call as the actual lapse rate on preceding call, the lapse rate being the lapse of insurance in force.

Q. What was the percentage of lapsation on call 127?

A. 2.76 per cent.

Q. What was the actual percentage of lapsation on that call?

A. 2.58 per cent.

Q. Do you not conclude, therefore, that the whole of call 127 was paid, that is, that the company realized the full amount of that assessment and had a little more on the assessment than was required to pay the death losses for which the assessment was levied?

A. I have not concluded that. I only know that the actual lapse rate was 2.58 per cent, and the company assumed a lapse of 2.76 per cent.

Mr. Holman read the following, being the next question:

Q. Call 127 on the basis of one rate amounted to $79,258.48, did it not?

A. It did.

Q. And from that amount you deducted 2.76% as your assumed lapsation on that call and that amounted to $2,187.53?

A. That is right.

103 Q. Now, as a matter of fact, that estimate of 2.76 was higher than the results justified; in other words, there was not a lapsation to the extent of $2,187.53.

A. That estimate, as you call it, was greater than the actual lapse. It was absolutely necessary for the company under the terms of the contract, to make that allowance for discontinuance of membership, and the company has to use its best judgment in making that assessment. It is absolutely impossible that the estimate shall ever be the same as the actual result, but we use, as I have before stated, the actual lapse rate of the preceding call, which is the nearest estimate we can make.

Q. Have you figured in dollars and cents what the actual lapsation was?

A. I have not.

Q. Well, it was 2.58 per cent of $79,258.48?

A. That is right.

Mr. Durment read the immediately succeeding questions as follows:

Q. You have stated in your examination in chief that the death losses on March 31, 1910, amounted to the sum of $540,000?

A. I did.

Q. (P. 61:) From December 31, 1909, to March 31, 1910, was there not an extraordinary or unusual rate of mortality in the assessment department of your company?

A. During all the year 1910, we had a higher mortality than we had experienced in the past in the Men's Division of the Safety Fund Department.

104 Q. What was the average amount of death losses per month during the year 1909?

A. About $100,000 a month; $100,000 to $115,000, running up some months as high as $140,000, but the average was somewhere around $115,000, a month.

Q. For the year 1909?

A. Yes.

Q. What was the average amount of death losses in this assessment department, monthly average, for the period from December 31, 1909, to March 31, 1910? To refresh your recollection, I think you stated yesterday that the monthly average of death losses during the first six months of 1910 was something over $100,000; that is correct, is it not?

A. It is.

Q. Now, during the whole of the year 1910 did the monthly average of death losses greatly exceed the sum of $100,000, or was it approximately that average during that year?

A. I will furnish you with the actual death losses month by month for the year 1910.

Q. And the statement will be attached to the deposition as a part of your testimony?

A. I will furnish same.

Paper marked Ex. 46 and offered in evidence by plaintiff. (Ex. 13 on the trial.)

Q. (P. 66:) At that time the company had on deposit in banks a cash balance in the mortuary fund of $168,473.58; is that not correct? I refer to March 31, 1910.

A. It is.

Q. That balance in the mortuary fund was subject to

105 check by the officers of the company?

A. It was.

Q. And it was within the discretion of the officers of the company as to whether they would then use the whole or a portion of

that mortuary balance in payment of a part of these unpaid death losses which had been approved on the 31st day of March, 1910?

A. It was in their best judgment as to the benefit of the membership to so use the mortuary balance that no claims would come due by reason of the ninety days expiring before June 1st, the date when the next call would come in, with no money on hand, with no balance on hand in the mortuary fund to pay these claims.

Q. It appears to me that you have not answered the question as put to you. If the company through its officers, in its best judgment at that time, that is, on March 31, 1910, or thereabouts had desired to pay a portion of this unpaid balance of death losses, amounting to $201,667.67, it could have done so by checking against the balance of the mortuary fund deposited in the banks; is that not so?

A. If it was their best judgment to do so, yes sir.

Q. And whether that fund should be applied for that purpose depended altogether on the exercise of the judgment of the officers of the defendant corporation?

A. If it was their best judgment for that purpose depended altogether on the exercise of the judgment of the officers of the

106 defendant corporation?

A. Yes, the judgment of the officers of the defendant corporation being based on conditions as they then existed.

Q. (P. 111:) Please state what is the paper I now hand you and which will be marked Ex. 51.

A. That is a statement year by year, from 1880 to March 31, 1910, of the amounts received from mortality calls in the mortuary fu ,ndand of the amount paid for death losses from that fund. The first column shows the year, the second the amount received during the year from mortality calls in the mortuary fund, and the third column the amount paid during the year from the mortuary fund for death losses.

Q. And covers a period from the inception of that fund down to and including March 31, 1910?

A. It does.

Mr. DURMENT: Now, we offer in evidence Ex. 51 in the deposition. (Deft's. Ex. 14 on the trial.)

Ex. 2 of this deposition, which is the application on which this certificate was issued, we offer in evidence. (Deft's. Ex. 15 on the trial.)

Q. (P. 38:) I hand you this paper, dated Hartford, Connecticut, May 2, 1898, headed "Special Notice" in red type; is that another written statement of the rule you have just referred to?

A. It is.

Q. Which was sent to the membership?

A. At the time the rule was adopted in 1898.

107 Paper marked Ex. 33 and offered in evidence by the defendant.

Q. Is that another statement of the same rule?

A. It is.

Ex. 34, and offered in evidence by the defendant.

Mr. DURMENT: Now we offer in evidence Ex. 33 and Ex. 34. (Identified on the trial as Exhibits 16 and 17.)

The defendant here rested.

The plaintiff also rested.

Mr. DURMENT: At this time we desire to enter a motion that the Court direct a verdict for the defendant. I would like to be heard on that before the Court rules on it.

Mr. HOLMAN: An dthe plaintiff moves the Court that the Court direct a verdict in favor of the plaintiff in this action for the amount claimed, and I would like to be heard on that, too, if there is anything more to be heard about.

The COURT: I don't think there is anything for the jury in this case. The evidence is all admitted here, nobody disputes anything that the other side has said, it is practically an undisputed state of facts. It raises the question as to the proper construction of the contract, and whether or not the conduct of the company in reference to the accumulation of this surplus, the way they handled it, particularly in enforcing that same old rule in reference to the assumed percentage for lapsation——

Mr. HAID: Not the same rule, if your Honor please.

The COURT: Well, the same principle, of course, not
108 the same identical rule, but the same principle—of taking the last average; and also whether or not using that amount of this assessment as a fund to meet death losses which occurred subsequent to the assessment for which this was not assessed shows such a technical deviation from the rule of the policy as to make this assessment illegal in the sense that it ought not to be used as the basis of a forfeiture.

Mr. HAID: And that, your Honor rules, is a question of law in this case?

The COURT: That is a question of law under all the evidence in this case.

Mr. HOLMAN: Mr. Durment, may I ask you this question: If your motion for a directed verdict should be denied, do you claim there is anything for the jury to consider in this case?

The COURT: Well, I don't think there is.

Mr. DORMENT: Well, I don't know.

The COURT: I think wt would be practically asking the jury to decide a question of law, to take this contract and to construe it and say whether or not the cancellation had been in accordance with the rules provided by the contract. If I had thought there was any question for the jury to pass on in this case, I would have to deny both motions. All there is in this case is the evidence here showing this surplus and the manner in which it was accumulated, and then the defendant has come in and it has offered evidence explaining how they got that and what they used it for and
109 endeavored to show that that was not a deviation from the rule of the contract and was reasonable under the circumstances. There isn't any dispute about the evidence in this case, no issues under the evidence. What inferences are to be drawn from

it, it seems to me, are purely a question of law. If the defendant is right in his contention he ought to have a verdict, and if the plaintiff is right, she ought to have a verdict.

Mr. DURMENT: Now, my first basis of the motion is the fact that there was clearly and beyond any question of doubt in this case a default in payment of dues, which in itself alone was sufficient to forfeit this policy. Not only do we claim that on the evidence as it stands, regardless of any other reasons I have mentioned specially why it should be granted, there are some special reasons in addition that your Honor cannot deny without coming in conflict with that section of the United States Constitution which forbids the state to make any law impairing the obligation of the contract, and the Fourteenth Amendment, which may not deprive one of his property without due process of law.

After argument by Mr. Holman on behalf of plaintiff, Mr. Durment said:

Mr. DURMENT: One of my grounds is that it appears from the evidence in this case that this Court has no jurisdiction to render a judgment against this defendant for this money, that it is wholly within the jurisdiction of the state of Connecticut to enforce payment out of a fund that is in the possession of a corporation of the state of Connecticut, in the hands of one in Connecticut
110 who holds it as trustee under a Connecticut contract and for payment out of a fund which is itself in Connecticut; it is entirely beyond the jurisdiction of this court to affect the fund.

The COURT: It appears to me, from the uniform course of dealing which the defendant had with this deceased, Hermann Ibs, that they themselves interpreted their rights under the contract to mean that the death loss could only be paid out of the proceeds of an assessment based upon that loss. In every one of these notices in evidence it is specifically stated that the assessment is made, not for the purpose of replenishing the fund, but for the purpose of meeting certain specified claims named in a list accompanying the notice. That is their own interpretation of their rights under that contract in their dealings with Hermann Ibs, and in this notice they said they wanted this particular assessment to help pay 145 death losses, a list of which accompanied the notice. It appears, however, that a large portion of those already had been paid out of a surplus in the mortuary fund which arose by reason of past excessive assessments—that is, excessive in the sense that they had in some manner or other gotten more than they needed to meet the past losses assessed for. It appears that they only needed one hundred and twenty-four thousand and some odd hundred dollars to pay the remaining portion of these 145 losses and that they still had $168,000 surplus, so that they would
111 have paid all of these 145 losses, which this assessment was made to meet, without assessing for one penny; that instead of using the proceeds of the assessment in the manner in which they had always claimed in their dealings with Mr. Ibs that they were going to use it, that they had the right to use it under the policy, instead of using it according to their own interpretation of

their rights under the policy—which they had used in all their dealings with Mr. Ibs—as a matter of fact they were using it to pay some death claims for which no assessment had been made and holding it to meet some that they expected might come later. It seems to me that under those circumstances it was such a deviation from their rights under the policy, as they themselves had interpreted it, as made this assessment illegal when it is sought to base a forfeiture upon the non-payment of that assessment. So, gentlemen, as I view this case, I think I am compelled under the law to direct you to return a verdict in favor of Mrs. Ibs, the plaintiff in this case, for the $2,000 with interest at six per cent since the 31st day of August, 1910.

Mr. DURMENT: I want it to appear in the record that we claim that this verdict should be directed, if at all, in that amount to be paid out of the mortuary fund and not as a personal claim. We ask the Court that the verdict should not be a general verdict payable as against the defendant, but out of this particular fund.

Mr. HOLMAN: Oh, no!

112 Mr. DURMENT: Well I put that in the record, and we insist it is all right.

The COURT: All right, put it in the record, but I am going to direct a verdict against the defendant for that much money. I refuse that request and direct a general verdict.

Mr. DURMENT: An exception to the general verdict. And we also except to your Honor's directing a verdict and to your Honor's denial of our motion, upon the grounds we have specifically stated, as well as other grounds. It is in violation of the Constitution of the United States for the various reasons we suggested, and it is a case in which the Court has not jurisdiction to try and determine this matter and not in accordance with the evidence.

The COURT: Let the record show that at first the defendant's motion is denied and the plaintiff's motion is granted.

Mr. HOLMAN: It amounts to $2,268.32.

Mr. DURMENT: We will agree that the amount is correct if they are entitled to have a verdict.

A verdict was returned by the jury in favor of the plaintiff in the sum of $2,268.32.

A stay of forty days was granted.

113 PLAINTIFF'S EXHIBIT A.

No. 70627. Age 45.

The Hartford Life and Annuity Insurance Company, Hartford, Connecticut.

Certificate of Membership, Safety Fund Department.

Maximum Indemnity, $ —.

In consideration of the representations, agreements, and warranties made in the application herefor, and of the Admission Fee paid;

and of the sum of Ten Dollars, on each $1,000 of the Maximum Indemnity herein provided for, to be paid to said Company as herein required, to create a Safety Fund as hereinafter described, and of Three Dollars per annum on each $1,000 for expense, Dues, to be paid as hereinafter conditioned, and of the further payment of all Assessments proportioned to the Maximum Indemnity herein provided for, levied against the herein named member to form a Mortuary Fund for the payment of all Indemnity matured by deaths of members, which assessments, to be levied upon all the members in the department wherein this Certificate is issued whose Certificates are in force at the dates of such deaths, shall be made according to the table of graduated assessment ratios given hereon, and as ffurther determined by their respective ages and the aggregate Maximum Indemnity at the dates of such deaths, with due allowance for discontinuance of membership, does hereby issue this Certificate
114 of Membership in its Safety Fund Department to Hermann Ibs (herein called the Member) of St. Paul, County of Ramsey, State of Minnesota, with the following agreements:—

That ninety days from the receipt by the President or Secretary of said Company of satisfactory proofs, together with full information as to the manner and cause, of the death of the herein named member while this Certificate is in force, all the conditions hereof having been conformed to by the member, there shall be due and payable, out of the aforesaid Mortuary Fund and not otherwise, the Maximum Indemnity of Two Thousand Dollars (less the balance unpaid, if any, of the stipulated contribution to said Safety Fund, with fifty per cent added, together with any balance due said Company,) to his wife Eliza Ibs if living otherwise to his legal representatives, upon presentation and surrender of this Certificate properly receipted. All such payments to be made at the Home Office of said Company in lawful money of the United States.

That said Company will deposit said sum of Ten Dollars, when received, with the Trustee, named in a contract made with it (of which a copy is printed hereon), as a Safety Fund in trust for the uses and purposes expressed in said contract; and shall at the expiration of five years from July 1, 1879, if said Safety Fund shall then amount to Three Hundred Thousand Dollars, or whenever thereafter said sum shall be attained, make a semi-annual
115 division of the net interest received therefrom by it, pro rata among all the holders of Certificates in force in said Department at such times, who shall have contributed five years prior to the date of any such division their stipulated proportion of said Fund, by applying the same to the payment of their future dues and assessments; and that, whenever said Fund shall amount to One Million Dollars, all subsequent receipts therefor shall be divided by the said Company in like manner as the interest. Said Company further agrees that if at any time, after said Fund shall have amounted to Three Hundred Thousand Dollars, or after five years from January 1, 1880, if that amount shall fail by reason of insufficient membership, or. shall neglect if justly and legally due, to pay the Maximum Indemnity provided for by the terms of any Certificate issued in

said Department, and such Certificate shall be presented for payment to said Trustee by the legal holder thereof, accompanied by satisfactory evidence, as hereinafter provided, of its failure to pay, after demand upon it within the time herein stipulated for limitation of action, then it shall be the duty of said Trustee to at once convert said Safety Fund into money and divide the same (less the reasonable charges and expenses for the management and control of said Fund,) among all the holders of Certificates then in force in said Department, or their legal representatives, in the proportion which the amount of each of their Certificates shall bear to the amount of the whole number of such Certificates in force; and that in
116 such event it shall file with said Trustee a correct list, under oath, of the names, residences and amounts of the Certificates of all members entitled to participate in such division. The evidence referred to above to be either certification by said Insurance Company's President or Secretary that a claim is justly and legally due and that payment thereon has been demanded and refused, or the duly attested copy of a final judgment obtained thereupon in any court of competent jurisdiction, satisfaction of which has been neglected or refused for the period of sixty days from its date. And said Company further agrees that so long as any Certificate of Membership in its Safety Fund Department shall remain in force, said Fund shall be in no wise chargeable or liable for any use or purpose except as above mentioned.

And said Company further agrees that the aforesaid Mortuary Fund shall be in no wise chargeable or liable for any use or purposes other than for the settlement of Death Claims, except as herein mentioned.

This certificate is issued by the company and accepted by the member upon the express conditions and agreements given elsewhere hereon, and assented to as forming part of this contract.

In witness whereof, The said Hartford Life and Annuity Insurance Company have, by their President and Secretary, signed
117 and delivered this contract, at Hartford, Conn., this 4th day of April one thousand eight hundred and eighty-five.

F. R. FOSTER, *President.*
STEPHEN BALL, *Secretary.*

[Seal Hartford Life & Annuity Insurance Co., Hartford, Conn.]

[Ed. Jan. '85.]

Agents of the Company are not authorized to make any indorsements on or to vary the terms of this Certificate.

Annexed is a copy of the Application upon which this Contract is based.

This company has no agents authorized to receive money on assessments, dues, or safety fund.

No. 70627.

Hartford Life and Annuity Insurance Company of Hartford, Connecticut.

Certificate of Membership, Safety Fund Department.

Maximum Indemnity, $2000.

Name, Hermann Ibs; Agent, A. J. Hayes.

Read carefully all the Conditions of this Certificate.
No person should be a party to a contract without knowing all its conditions.

118 After an Agent has delivered this Certificate and collected the Admission Fee, no other payment connected with the indemnity under this Certificate must be made to the Agent without the production of a receipt signed by the Company's Secretary.

Always give number of this certificate in writing or remitting to home office.

This certificate is issued by the company and accepted by the member upon the following express conditions and agreements.

1. *Application Made Part of Contract.*—The application on the faith of which this Certificate issues is hereby referred to and made part of this contract; and the member hereby agrees that the answers and statements therein contained are material and that they are full, complete and true; that he has verified them and adopts as his own, each statement, representation and answer made therein, whether written by him or not; and that statements made to agent not therein written shall form no part of this contract.

2. *Of Payments.*—The member agrees to pay to said Company Dues of Three Dollars per annum on each $1,000 Indemnity, for expenses, on the first day of the month after date of issue hereof, and at every anniversary thereafter so long as this Certificate shall remain in force; or by monthly or other pro rata installments of the same in advance for periods of less than a year. And also

119 agrees to pay said Company, upon all Certificates that shall mature by death, within thirty days from day on which notices bear date, all Assessments determined as within set forth; the proceeds of which, after deducting ten cents on each Assessment for cost of collection, shall form said Mortuary Fund. And further agrees to pay said Company the sum of Ten Dollars on each $1,000, as above, towards said Safety Fund, in a single payment, within sixty days from date hereof; but if not so paid, then by equal installments thereof, monthly, during the first year of membership, commencing sixty days from date hereof: In default of which payments towards the Safety Fund, said Company may for this purpose increase said Assessments by amounts equal to any such due and unpaid installments; and, while the whole or any portion of such required payment shall remain unpaid, said Company may apply toward payment thereof any unapplied sum standing to the credit of

this Certificate. All such payments to be made direct to the Home office of said Company, and not to agents, who are unauthorized to receive such payments.

3. *Conditions of Acceptance.*—The member further agrees and accepts this Certificate upon the express condition that if either the Annual Dues, Assessments or Safety Fund Deposit, as hereinbefore required, are not paid to said Company on the day due, then this Certificate shall be null and void, and of no effect, and no person shall be entitled to damages or the recovery of any moneys
120 paid for protection while the Certificate was in force, either from said Company or the Trustee of the Safety Fund; and that if a legal and just claim to benefit, under the terms of this Certificate, shall arise before said Safety Fund shall have accumulated to Three Hundred Thousand Dollars, or before January 1, 1885, and the sum collected on the assessments made on account of such event shall be paid over, as hereinbefore stipulated; or if such claim shall arise after said Fund shall have accumulated to said amount, or after January 1, 1885, and this Certificate be fully settled and surrendered; or if any final division from said Safety Fund, as hereinbefore provided, shall be made by the Trustee thereof on account of this Certificate, then, in all such cases, all liability of said Company and of its Safety Fund, on account of this Certificate, shall cease.

4. *Giving Notice.*—A printed or written notice, directed to the address of the member, as it appears at the time on the books of the Company, and deposited in the post office at Hartford, or delivered by an agent of the Company, shall be deemed a legal and sufficient notice for all purposes hereof. A transcript of the books of said Company, certified by the Secretary, showing such facts, shall be taken and accepted as conclusive evidence of the mailing of such notice, and of the facts aforesaid, as set forth in such transcript. Notices given to the member while any payment that has fallen due hereon shall be unpaid, are to be understood only as notices to reinstate membership and shall not be held to extend maturity of
121 such unpaid payments nor as waiving proof that the member is alive and in good health, proof of which to the satisfaction of the Company shall be tendered with all payments for reinstatement, nor shall such payments be effective to reinstate membership unless they shall be received at the Company's Home Office anterior to the member's death.

5. *Change of Residence or Address.*—In case of change of residence, post office address, occupation, or name of the member, or his beneficiary, the member or his beneficiary shall at once give notice thereof in writing to the Secretary of the Company. In case of failure to do so, the Company may proceed for all purposes as if no such change had been made.

Express Conditions and Agreements, As Above (Continued).

6. *Prohibitions.*—If the member shall be personally engaged in blasting, submarine operations, mining underground, manufacturing poisonous or explosive chemicals, retailing intoxicating beverages, as engineer or fireman on railroad locomotive, or in "braking" or "coupling" on, and "making-up" of, railroad trains, trading or living among savage tribes or nations, or shall be engaged in military service (except in time of peace), or in a naval or any marine service, without, in each of these cases, having first obtained the written consent of said Company, or shall use alcoholic or narcotic stimulants so as to produce intoxication sufficient to impair
122 his health or to produce delirium tremens or to cause his death; or shall die by self-destruction—whether sane or insane—or while intoxicated or from effects of drunkenness, or as the result of a duel, or in consequence of keeping or visiting unlawful or disreputable resorts or of the violation or attempted violation of the laws of any Nation, State, Province or Municipality; or if there has been any concealment, misrepresentation or false statement or statement not true made in the application on which this Certificate issues; or if the conditions of this Certificate shall not be in all respects observed and performed by the member to whom this Certificate issues; then, and in all such cases, this Certificate shall be null and void, and of no effect, and no person shall be entitled to damages, or the recovery of any moneys paid thereon.

7. *Travel and Residence.*—The member herein named is at liberty to travel by railroad, sea, lake, or river, by all trains, first-class steamers and sailing vessels, and to visit or reside in any portion of the world other than the residence named in the application herefor, where inhabited and civilized, and free from epidemics, wars, or internal dissensions.

8. *Limitation of Action.*—It is expressly understood and agreed that no action shall be maintained, nor recovery had, for any claim upon or by virtue of this certificate, after the lapse of one year from the death of said member; and if no suit or proceedings for such recovery be commenced within one year from the date
123 of death of said member it shall be deemed a waiver, on the part of all parties concerned, of all rights or claims under or by virtue of this Certificate, and as conclusive evidence against the validity of such claim, and this Certificate shall be null and void, and of no effect, and no person shall be entitled to damages or the recovery of any moneys paid thereon. And it is further expressly agreed, in case any suit or proceeding shall be commenced for the recovery of any claim under this Certificate after the lapse of one year from the death of said member, or when the claim is otherwise illegal or fraudulent, that the person or persons so commencing suit or proceeding, on failure to obtain judgment therefor, shall pay to said Company the sum of two hundred dollars, as its reasonable attorney fees and damages, in addition to the taxable costs and allowances in the case.

9. *Debts and Liens.*—It is further agreed that this Certificate shall be charged with any and all amounts that may be owing from the member or beneficiary herein, or their assigns, to said Company at the time of the payment of this Certificate, and the Company reserves a lien thereon to secure the payment of any such indebtedness, and the right to deduct and withhold the amount of any such account or indebtedness in payment thereof. But nothing herein contained shall be held to constitute a waiver of forfeiture if any of the hereinbefore stipulated payments shall not be paid when due and in the manner set forth in the conditions of this Cer-
124 tificate. And that in case the laws of any Country, State, or municipality in which the member or his beneficiary may reside shall require a tax to be paid by said Company on account of any moneys collected hereon, said member agrees to pay the amount of such tax to said Company in addition to the payments hereinbefore named, as part of the payments needed to hold this Certificate in force, either in connection with the payments of assessments and annual dues or otherwise, as said Company may from time to time elect.

10. *Assignments.*—This Certificate shall not be assigned or transferred unless with the concurrent action of the member and beneficiary or beneficiaries, assignee or assignees thereunder; nor unless with the consent in writing of said Company's Secretary and filing with him a copy of all such assignments or transfers, nor unless a claim hereunder, made by an assignee, be subject to proof of interest; nor unless the amount recoverable hereunder by any such assignee (except such assignee shall bear to the member the relationship of wife, child, parent, brother or sister), be limited to the value of the interest proven.

11. *Powers of Agents.*—Agents of the Company can not alter or waive any of the conditions of this Certificate, nor issue permits of any kind, and they are not authorized to make any indorsements hereon, nor to receive or receipt for money on behalf of this Company other than for Admission Fees, for the receipt of which alone the delivery of this Certificate is acknowledgment. Members entrusting
125 money to agents for payment of Assessments, Dues, or Security Fund Deposits, can not hold the Company responsible therefor, until the procurement and delivery by the agent of a receipt, signed by its President or Secretary, for moneys thus entrusted, evidencing the reception of such payment at the Company's Home Office before any default in payment shall have occurred.

Trustees' Contract.

This Agreement, made and entered into this Thirty-first day of December, A. D. 1879, by and between the Hartford Life and Annuity Insurance Company, a corporation organized under the laws of the State of Connecticut, and located in the City of Hartford in said State, party of the first part; and the Security Company, a like corporation also located at said Hartford, party of the second part; witnesseth:

[illegible] The party of the first part purposes to issue to persons [illegible] certificates of membership in a special department of its business to be known as the Safety Fund Department, and, in consideration of the sum of ten dollars to be received on each one thousand dollars of the amount of each and every such Certificate for the purpose of creating a Safety Fund, to enter hereby into sundry agreements with such persons in the following words; to wit:

"That said Company will deposit said sum of ten dollars, which is received, with the Trustee, named in a contract made with it (of which a copy is printed hereon), as a Safety Fund in trust for the uses and purposes expressed in said contract; and shall at the expiration of five years from July 1, 1898, if said Safety Fund shall then amount to three hundred thousand dollars, or whenever thereafter said sum shall be attained, make a semi-annual division of the net interest received therefrom to it pro rata among all the holders of Certificates in force in said department at such time, who shall have contributed five years prior to the date of any such division their stipulated proportion of said Fund, by applying the same to the payment of their future dues and assessments; and that, whenever said Fund shall amount to one million dollars, all subsequent receipts therefrom shall be divided by the said Company in the manner as to interest."

"Said Company further agrees that if at any time, after said Fund shall have amounted to three hundred thousand dollars, or after five years from January 1, 1898, if that amount shall not have been attained before that date, it shall fail by reason of insufficient membership, or shall neglect if justly and legally due, to pay the maximum indemnity provided for by the terms of any Certificate issued to said department, and such Certificate shall be presented for payment to said Trustee by the legal holder thereof, accompanied by satisfactory evidence, as hereinafter provided, of its failure to pay, after demand upon it within the time herein stipulated for limitation of action, then it shall be the duty of said Trustee to ascertain said Safety Fund into money and divide the same (less the reasonable charges and expenses for the management and control of said Fund,) among all the holders of Certificates then in force in said department, or their legal representatives, in the proportion which the amount of each of their Certificates shall bear to the amount of the whole number of such Certificates in force; and that in such event it shall be with said Trustee a matter for, under oath, of the cause, evidence and account of the Certificate of all members entitled to participate in such division. The evidence referred to above to be either satisfactory to said Insurance Company's President or Secretary that a claim is justly and legally due and that payment thereof has been demanded and refused, or the duly attested copy of a final judgment obtained thereupon in any court of competent jurisdiction, satisfaction of which has been neglected or refused for the period of sixty days from its date."

hundred thousand dollars, par value, of the bonds purchased for said Fund, when the party of the second part will pay over to the party of the first part, semi-annually thereafter, all the further income from said Fund (less the accruing and unpaid com-
130 pensation and expenses), to be by the party of the first part used for the purposes mentioned in the hereinbefore recited agreements: And, unless such default shall occur, will thereafter add to the principal of said Fund the deposits thereafter received from the party of the first part, exclusive of the income therefrom, until the whole Fund shall amount in such bonds, at their par value, to one million dollars: And in the event of the failure or neglect mentioned in the hereinbefore recited agreements, will convert said Fund into money and divide the same in accordance with the hereinbefore recited agreements, as soon as can reasonably be done after the necessary information of the proper persons and their shares shall have been obtained: Said party of the first part hereby agreeing to put the party of the second part in possession of the information required for the making of a proper division thereof as agreed with its Certificate holders.

All payments required hereby to be made to the party of the first part to cease upon the aforesaid failure or neglect of the party of the first part; and all payments required herein to be made to the Certificate holders by the party of the second part to be made at the office of said Trustee or of the successor in said trust.

The necessary expenses connected with the management of said Fund shall be limited to the ordinary commissions for purchasing or selling and transfer or transmission of the hereinbefore mentioned bonds, together with the cost of the stationery and
131 postage used in replying to requests for information of the condition of said Fund and the actual cost of any judicial action needed to determine the legal status of said Fund: All other expense to be included in and covered by such reasonable charge as shall be made for the compensation of the trusteeship, to be determined by the amount of time and labor involved in the execution thereof.

It is hereby mutually understood and agreed by both parties hereto that all the hereinbefore recited agreements of the party of the first part with its Certificate holders shall constitute the uses and purposes of the trust expressed herein. And it is hereby further understood and agreed that at such time as it shall be shown that all Certificates of membership issued by the party of the first part in its Safety Fund Department, have been legally settled and surrendered to it, or properly canceled in accordance with their terms, it shall be held and considered that the uses and purposes of said trust have been fully accomplished by said Insurance Company, and the balance of said Fund, if any, shall be paid over to the party of the first part.

And it is further understood and agreed that if said party of the second part shall, for any cause, fail to perform its duties as such Trustee as hereinbefore specified, or if, by reason of financial embarrassment of the party of the second part, or other cause, it shall

be deemed expedient to remove said trust from its hands, then a new Trustee may be appointed, by the mutual nomination of said
132 Insurance Company, and the then Insurance Commissioner of the State of Connecticut, to succeed to said trust, with all the duties and obligations herein imposed upon said original Trustee, and said party of the second part shall surrender said Fund to such successor.

In witness whereof, the party of the first part has affixed hereto the corporate seal of said Insurance Company and caused these presents to be signed by its President and Secretary.

And the party of the second part has hereto affixed its corporate seal and its President and Treasurer have hereunto set their hands.

Done in duplicate at Hartford in the State of Connecticut the day and year first above written.

[SEAL.] HARTFORD LIFE AND ANNUITY INS. CO.,
By E. H. CROSBY, *President, and*
STEPHEN BALL, *Secretary.*
SECURITY COMPANY,
By ROBERT E. DAY, *President, and*
[SEAL.] WILLIAM L. MATSON, *Treasurer.*

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Table of Graduated Assessment Ratios for Every $1,000 *of Death Loss on Each* $1,000 *of a Total Indemnity in Force of* $1,000,000.

Age.	Rate.	Age.	Rate.	Age.	Rate.	Age.	Rate.
15 to 21	$0 65	33	$0 91	44	$1 20	55	$1 92
22	67	34	94	45	1 22	56	2 03
23	69	35	97	46	1 25	57	2 15
24	71	36	1 00	47	1 30	58	2 32
25	73	37	1 03	48	1 35	59	2 50
26	75	38	1 06	49	1 40	60	2 68
27	77	39	1 09	50	1 47	61	2 86
28	79	40	1 12	51	1 54	62	3 08
29	81	41	1 14	52	1 63	63	3 30
30	83	42	1 16	53	1 72	64	3 65
31	85	43	1 18	54	1 81	65	4 00
32	88						

These ratios decrease in proportion as the total indemnity in force increases above $1,000,000 in amount, and are calculated so as to cover the stipulated cost of collection.

PL'FF'S EX. B.

Identical with Pl'ff's Ex. D except that it is not stamped "Second Notice" and "Registration Fee $.50."

PL'FF'S EX. C.

Hartford Life Insurance Company, Hartford, Conn.

Registered Letter Notice.

June 9", 1910.

You are hereby notified that Quarterly Call No. 127, on Policy No. 2–70627 notice of which was mailed you May 2, 1910,
134 and duplicate of which is enclosed herewith, has not been paid.

Unless the amount of $35.95 the amount due on said Quarterly Call including Fifty Cents for this Notice, is received at this office on or before *June 20, 1910, your policy will be cancelled.

GEO. E. KEENEY, *President.*

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*June 30th if residence is on or west of the meridian of Salt Lake, Utah.

Form 0261.

PL'FF'S EX. D.

Special Notice of Quarterly Call No. 127.

Your next Quarterly Call will fall due and be payable Sept. 1, 1910.

Hartford Life Insurance Company.

HARTFORD, CONN., May 2, 1910.

Second Notice.

Herman Ibs, 105 Central Ave., St. Paul, Minn.:

2–70627.

This Call which will be due June 1st, 1910, is made to meet 145 Deaths (as shown by accompanying list), Benefits, $323,919.95 and expenses on your policy, as follows:

For Mortality Call	$33.95
" Quarterly Dues to Sept. next	1.50
Credit	$—
Amount Due	$35.45
Registration Fee	.50

Payment will not be accepted later than June 5, 1910, unless residence is on or west of the meridian of Salt Lake, Utah,
135 in which case payment will be accepted up to and including June 15, 1910.

Unless the payment called for by this notice shall be paid to the Company at its Home Office by or before the day it falls due the policy and all payments thereon will become forfeited and void.

Return this notice with remittance payable to

Hartford Life Insurance Company.

Make all remittances by Draft, Check, P. O. or Express Money Order when possible. Letters containing currency must be registered.

See over for Special Notice.

Special Notice.

If the payment of the above Quarterly Call is not received at this office on or before *June 5, 1910, the last day allowed for payment in the above notice, a second notice will be mailed to the policyholder by registered letter, giving until *June 20, 1910, to remit, and the same charge will be made for this second notice as is fixed by the law of Massachusetts, namely, fifty cents.

Every member whose payment does not reach this office on or before *June 5, 1910, will be obliged to pay this fifty cent fee in order to have the policy unconditionally reinstated.

After *June 20, 1910, the limit allowed for payment under the registered notice, the Company reserves the right to require a medical examination as a condition of re-instatement.

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*If residence is on or west of the meridian of Salt Lake, Utah, ten days' additional time is allowed.

136–143 "PLAINTIFF'S EXHIBIT 'E.'"

"This is a list of deceased members, the claims of whose beneficiaries are included in Quarterly Call No. 127, and a copy of which list was sent to each member against whom an assessment was made, and shows the name of the deceased member, his location, date of his death and amount for which he was insured."

* * * * * * *

144 PLAINTIFF'S EXHIBIT F.

Certf. No. 70627—Herman Ibs.

Dues.

Year.	Date Due.	Date Paid.
1885	May 1st	April 25th
	Nov. 1st	Nov. 2nd
1886	May 1st	May 4th
	Nov. 1st	Nov. 1st
1887	May 1st	May 2nd
	Nov. 1st	Nov. 1st
1888	May 1st	May 1st
	May 1st-89	Dec. 1st
1889	Nov. 1st	Aug. 31st
1890	May 1st	Feb. 28th
	Nov. 1st	Aug. 30th
1891	May 1st	May 1st
	Nov. 1st	Nov. 2nd
1892	May 1st	April 30th
	Nov. 1st	Oct. 13th
	Dec. 1st	Nov. 29th
1893	Mch. 1st	Feb. 27th
	June 1st	May 27th
	Sept. 1st	Aug. 28th
	Dec. 1st	Nov. 28th
1894	Mch. 1st	Feb. 27th
	June 1st	May 31st
	Sept. 1st	Aug. 30th
	Dec. 1st	Nov. 30th

145

1895	Mch. 1st	Mch. 1st
	June 1st	June 5th
	Sept. 1st	Sept. 2nd
	Dec. 1st	Nov. 29th
1896	Mch. 1st	Mch. 3rd
	June 1st	June 1st
	Sept. 1st	Aug. 31st
	Dec. 1st	Nov. 28th

PLAINTIFF'S EXHIBIT F—Continued.

Year.	Date Due.	Date Paid.
1897	Mch. 1st	Mch. 1st
	June 1st	May 28th
	Sept. 1st	Aug. 30th
	Dec. 1st	Nov. 29th
1898	Mch. 1st	Feb. 26th
	June 1st	May 26th
	Sept. 1st	Aug. 31st
	Dec. 1st	Nov. 28th
1899	Mch. 1st	Feb. 23rd
	June 1st	May 27th
	Sept. 1st	Aug. 28th
	Dec. 1st	Nov. 29th
1900	Mch. 1st	Feb. 26th
	June 1st	May 31st
	Sept. 1st	Aug. 30th
	Dec. 1st	Nov. 28th
1901	Mch. 1st	Feb. 27th
	June 1st	May 31st
	Sept. 1st	Aug. 29th
	Dec. 1st	Dec. 5th
146		
1902	Mch. 1st	Mch. 3rd
	June 1st	May 28th
	Sept. 1st	Aug. 28th
	Dec. 1st	Dec. 1st
1903	Mch. 1st	Feb. 24th
	June 1st	June 1st
	Sept. 1st	Aug. 31st
	Dec. 1st	Nov. 30th
1904	Mch. 1st	Mch. 1st
	June 1st	June 1st
	Sept. 1st	Aug. 20th
	Dec. 1st	Nov. 28th
1905	Mch. 1st	Feb. 27th
	June 1st	May 29th
	Sept. 1st	Sept. 1st
	Dec. 1st	Dec. 1st
1906	Mch. 1st	Feb. 23rd
	June 1st	May 25th
	Sept. 1st	Aug. 27th
	Dec. 1st	Nov. 26th

PLAINTIFF'S EXHIBIT F—Continued.

Year.	Date Due.	Date Paid.
1907	Mch. 1st	Feb. 25th
	June 1st	May 27th
	Sept. 1st	Aug. 26th
	Dec. 1st	Nov. 30th
1908	Mch. 1st	Feb. 26th
	June 1st	May 28th
	Sept. 1st	Aug. 28th
	Dec. 1st	Nov. 27th

147

1909	Mch. 1st	Feb. 25th
	June 1st	May 26th
	Sept. 1st	Aug. 25th
	Dec. 1st	Nov. 27th
1910	Mch. 1st	Feb. 23rd

Certf. 70627. Herman Ibs.

Year	Call No.	Am't of Assessment.	Date of Notice.	Date Due.	Date Paid.
	27	$3.09	Aug. 2nd	Sept. 1st	Aug. 10th
1885.....	28	5.07	Nov. 1st	Dec. 1st	Nov. 27th
	29	5.11	Jan. 30th	Mch. 1st	Feb. 23rd
1886.....	30	5.20	May 2nd	June 1st	May 8th
	31	5.49	Aug. 2nd	Sept. 1st	Aug. 19th
	32	5.37	Nov. 1st	Dec. 1st	Nov. 26th
	33	5.37	Jan. 30th	Mch. 1st	Mch. 5th
1887.....	34	5.57	May 2nd	June 1st	May 26th
	35	5.57	Aug. 2nd	Sept. 1st	Aug. 27th
	36	5.57	Nov. 1st	Dec. 1st	Nov. 26th
	37	5.58	Jan. 31st	Mch. 1st	Feb. 24th
1888.....	38	5.80	May 2nd	June 1st	May 26th
	39	5.80	Aug. 2nd	Sept. 1st	Aug. 27th
	40	5.80	Nov. 1st	Dec. 1st	Dec. 1st
149					
	41	5.80	Jan. 30th	Mch. 1st	Feb. 14th
1889.....	42	6.00	May 2nd	June 1st	May 31st
	43	6.00	Aug. 2nd	Sept. 1st	Aug. 31st
	44	6.00	Nov. 1st	Dec. 1st	Nov. 29th

PLAINTIFF'S EXHIBIT G—Continued.

Year	Call No.	Am't of Assessment.	Date of Notice.	Date Due.	Date Paid.
	45	6.00	Jan. 30th	Mch. 1st	Feb. 28th
1890.....	46	6.31	May 2nd	June 1st	June 2nd
	47	6.31	Aug. 2nd	Sept. 1st	Aug. 30th
	48	7.55	Nov. 1st	Dec. 1st	Dec. 2nd
	49	8.00	Jan. 30th	Mch. 1st	Mch. 5th
1891.....	50	7.08	May 2nd	June 1st	May 29th
	51	7.08	Aug. 2nd	Sept. 1st	Aug. 29th
	52	6.91	Nov. 1st	Dec. 1st	Nov. 30th
1892.....	53	6.92	Jan. 31st	Mch. 1st	Feb. 23rd
150					
1892.....	54	7.32	May 2nd	June 1st	May 21st
	55	7.32	Aug. 2nd	Sept. 1st	Aug. 30th
	56	10.98	Nov. 1st	Dec. 1st	Nov. 29th
	57	7.32	Jan. 30th	Mch. 1st	Feb. 27th
1893.....	58	7.71	May 2nd	June 1st	May 27th
	59	7.71	Aug. 2nd	Sept. 1st	Aug. 28th
	60	7.71	Nov. 1st	Dec. 1st	Nov. 28th
	61	7.90	Jan. 30th	Mch. 1st	Feb. 27th
1894.....	62	8.30	May 2nd	June 1st	May 31st
	63	8.30	Aug. 2nd	Sept. 1st	Aug. 30th
	64	8.30	Nov. 1st	Dec. 1st	Nov. 30th

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	65	8.30	Jan. 30th	Mch. 1st	Mch. 1st	
1895.....	66	10.22	May 2nd	June 1st	June 5th	
	67	9.30	Aug. 2nd	Sept. 1st	Sept. 2nd	
	68	9.38	Nov. 1st	Dec. 1st	Nov. 29th	
151						
	69	9.38	Jan. 31st	Mch. 1st	Mch. 3rd	
1896.....	70	9.95	May 2nd	June 1st	June 1st	
	71	9.95	Aug. 2nd	Sept. 1st	Aug. 31st	
	72	9.96	Nov. 1st	Dec. 1st	Nov. 28th	
	73	9.96	Jan. 30th	Mch. 1st	Mch. 1st	
1897.....	74	10.53	May 2nd	June 1st	May 28th	
	75	10.53	Aug. 2nd	Sept. 1st	Aug. 30th	
	76	10.53	Nov. 1st	Dec. 1st	Nov. 29th	
	77	10.98	Jan. 30th	Mch. 1st	Feb. 26th	
1898.....	78	14.20	May 2nd	June 1st	May 26th	
	79	14.20	Aug. 2nd	Sept. 1st	Aug. 31st	
	80	14.20	Nov. 1st	Dec. 1st	Nov. 28th	
	81	14.20	Jan. 30th	Mch. 1st	Feb. 23rd	
1899.....	82	15.30	May 2nd	June 1st	May 27th	
	83	15.30	Aug. 2nd	Sept. 1st	Aug. 28th	
	84	15.30	Nov. 1st	Dec. 1st	Nov. 29th	
152						
	85	15.30	Jan. 30th	Mch. 1st	Feb. 26th	
1900.....	86	16.40	May 2nd	June 1st	May 31st	
	87	17.77	Aug. 2nd	Sept. 1st	Aug. 30th	
	88	17.77	Nov. 1st	Dec. 1st	Nov. 28th	

PLAINTIFF'S EXHIBIT G—Continued.

Year	Call No.	Am't of Assessment.	Date of Notice.	Date Due.	Date Paid.
	89	17.77	Jan. 30th	Mch. 1st	Feb. 27th
1901.....	90	18.97	May 2nd	June 1st	May 31st
	91	21.00	Aug. 2nd	Sept. 1st	Aug. 29th
	92	19.54	Nov. 1st	Dec. 1st	Dec. 5th
	93	22.16	Jan. 30th	Mch. 1st	Mch. 3rd
1902.....	94	23.86	May 2nd	June 1st	May 28th
	95	23.60	Aug. 2nd	Sept. 1st	Aug. 28th
	96	20.45	Nov. 1st	Dec. 1st	Dec. 1st
	27	20.45	Jan. 30th	Mch. 1st	Feb. 24th
1903.....	98	21.93	May 2nd	June 1st	June 1st
	99	21.93	Aug. 2nd	Sept. 1st	Aug. 31st
153					
	100	18.88	Nov. 1st	Dec. 1st	Nov. 30th
	101	22.26	Jan. 31st	Mch. 1st	Mch. 1st
1904.....	102	28.36	May 2nd	June 1st	June 1st
	103	28.36	Aug. 2nd	Sept. 1st	Aug. 20th
	104	26.84	Nov. 1st	Dec. 1st	Nov. 28th
	105	26.84	Jan. 30th	Mch. 1st	Feb. 27th
1905.....	106	31.04	May 2nd	June 1st	May 29th
	107	29.40	Aug. 2nd	Sept. 1st	Sept. 1st
	108	31.04	Nov. 1st	Dec. 1st	Dec. 1st

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	109	31.04	Jan. 30th	Mch. 1st	Feb. 23rd	
1906	110	28.60	May 2nd	June 1st	May 25th	
	111	30.64	Aug. 2nd	Sept. 1st	Aug. 27th	
	112	26.15	Nov. 1st	Dec. 1st	Nov. 26th	
	113	28.60	Jan. 30th	Mch. 1st	Feb. 25th	
1907	114	29.00	May 2nd	June 1st	May 27th	
	115	26.15	Aug. 2nd	Sept. 1st	Aug. 26th	
154						
	116	24.52	Nov. 1st	Dec. 1st	Nov. 30th	
	117	26.16	Jan. 31st	Mch. 1st	Feb. 26th	
1908	118	31.04	May 2nd	June 1st	May 28th	
	119	29.40	Aug. 2nd	Sept. 1st	Aug. 28th	
	120	26.94	Nov. 1st	Dec. 1st	Nov. 27th	
	121	30.72	Jan. 30th	Mch. 1st	Feb. 25th	
1909	122	30.72	May 2nd	June 1st	May 26th	
	123	30.72	Aug. 2nd	Sept. 1st	Aug. 25th	
	124	33.95	Nov. 1st	Dec. 1st	Nov. 27th	
1910	125	33.95	Jan. 30th	Mch. 1st	Feb. 23rd	

115 Pl'ff's Ex. H-6.

Your next Quarterly Call will fall due and be payable June 1, 1908.

Special Notice of Quarterly Call No. 96.

Hartford Life Insurance Company

Hartford, Conn., January 29th, 1908.

96.

This Call is made to meet 100 Deaths as shown by accompanying list, Benefits, $100,000, and expenses as shown below, on 1000 policy which will be due Mar. 1, 1908.

For Mortality Call	$11.50
" Quarterly Dues to June next	1.50
" Safety Fund	.....
Credit	$13.00
Dividend, To be applied if payment be made	1.50
Amount Due	$11.50

Stamped "Paid Feb. 10, 1908. Hartford Life Insurance Co. H. H. Parker, Treasurer.

Mormon No. 105 Martin St., St. Paul, Minn.

L-706227.

Payment will not be accepted later than Mar. 1, 1908, unless evidence is on or west of the meridian of Salt Lake, Utah, in which case payment will be accepted up to and including Mar. 31, 1908.

116 Unless the payment called for by this notice shall be paid to the Company at its Home Office by or before the day it falls due the policy and all payments thereon will become forfeited and void.

Return this notice with remittance payable to Hartford Life Insurance Company.

Make all remittances by Draft, Check, P. O. or Express Money Order when possible. Letters containing currency must be registered.

Special Notice.

If the payment of the above quarterly Call is not received at the office on or before *Mar. 1, 1908, the last day allowed for payment in the above notice, a second notice will be mailed to the policy holder by registered letter, giving until *Mar. 20, 1908, to make

[illegible]

[illegible]

[illegible]

Make all remittances by Draft, Check, P. O. or Express Money Order when possible. Letters containing currency must be registered.

Special Notice.

If the payment of the above Quarterly Call is not received at this office on or before *June 5, 1900, the last day allowed for payment in the above notice, a second notice will be mailed to the policy holder by registered letter, giving until *June 20, 1900, to remit, and the same charge will be made for this second notice as is fixed by the law of Massachusetts, namely, fifty cents.

Every member whose payment does not reach this office on or before *June 5, 1900, will be obliged to pay this fifty cent fee in order to have the policy unconditionally reinstated.

After *June 20, 1900, the limit allowed for payment under the registered notice, the Company reserves the right to require a medical examination as a condition of reinstatement.

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*If residence is on or west of the meridian of Salt Lake, Utah, ten days' additional time is allowed.

* * * * * * *

233 PL'FF'S EXHIBIT I.

ST. PAUL, MINN., June 29, 1910.

Hartford Life and Annuity Ins. Co., Hartford, Conn.:

I enclose money order of $35.95 in payment of assessment on Policy No. 70627 issued by your Co. to Herman Ibs.

Yours,

MRS. HERMAN IBS.

Herman Ibs, 105 Central Avenue, St. Paul, Minn.

PL'FF'S EXHIBIT J.

(On Letterhead of Hartford Life Insurance Company.)

HARTFORD, CONNECTICUT, July 1st, 1910.

Mr. Herman Ibs, 105 Central Ave., St. Paul, Minn.

DEAR SIR: We are in receipt of remittance in payment of Call due June 1st 1910 on Certificate No. 70627 on the life of Herman Ibs. As this Policy has already lapsed for non-payment of the Call mentioned above, and been canceled in accordance with its terms, it can only be reinstated upon furnishing the Company with satisfactory evidence of the insurability of the member without expense to the Company. The cost of reinstatement is $1.00. Upon receipt of a remittance for this amount, we will forward the necessary papers for applying for reinstatement.

234

In the meantime, we hold the remittance unused, as the Certificate has lapsed and been canceled.

Very truly yours,

T. F. LAWRENCE, *Secretary.*
R.

PL'FF'S EXHIBIT K.

ST. PAUL, MINN., Aug. 22, 1910.

Hartford Life Insurance Co., Hartford, Conn.

DEAR SIRS: On April the 4th, 1885, your company issued to Hermann Ibs of St. Paul, Minnesota, a policy of Life Insurance in the sum of $2,000.00, payable to Eliza Ibs, the wife of the insured. Mr. Ibs died on June the 27th last, and the beneficiary has employed me to collect the amount of the policy.

Will you kindly forward to me the necessary blanks so that I may submit proof of death of the insured as required by the regulations of your Company.

Yours respectfully,

O. E. HOLMAN.

235 PL'FF'S EXHIBIT L.

Hartford Life Insurance Co., Hartford, Conn.

T. F. Lawrence, Secretary.

August 31st, 1910.

Mr. O. E. Holman, Attorney at Law, No. 410–414 Globe B'ld'g, St. Paul, Minn.

DEAR SIR: We have before us your favor of the 22nd inst., referring to Certificate No. 70627 issued by this Company on the life of Hermann Ibs, and have to state in reply that this Certificate lapsed for non-payment of the call due June 1st, 1910, and was then canceled in accordance with its terms. The Certificate provided for the forwarding of a notice thirty days in advance of the date the assessment was due and further that if payment was not made on the date due, the Certificate should be canceled and of no effect.

A notice of the call due June 1st was forwarded to the member at his address as it appeared on our books on the second day of May. The Company's rules allowed four days of grace or until June 5th. They further allowed an extension of fifteen days, or until June 20th, and a registered second notice—in accordance with the Company's rules—was forwarded to the member advising him
236 that payment had not been made by June 5th, and that he had until June 20th to pay it. The payment was not made on or before June 20th and the Certificate was then canceled.

On June 29th a money order was mailed to us for the amount of the call and the $0.50 delinquent fee required by the Company's rules. This could not be accepted, the Certificate having been canceled, and the member was so notified. We notified him further that we could not accept it without satisfactory evidence of insurability without expense to the Company, and asked him to forward us $1.00, the fee for the medical examination so that we could give him the necessary instructions for applying for reinstatement. To that letter we had no reply and so, on July 29th, we returned by registered mail, the Money Order for $35.95 stating that the Certificate had been canceled and we therefore, returned the Money Order. This was directed to Mr. Ibs at his address as it appeared on our books. It was returned here however, undelivered.

As you are representing the beneficiary, we are handing you herewith the Money Order mentioned above. For your information we would state that this is a post-morten assessment contract, carried at exact cost, the assessments made having covered only the stipulated deposit to the Safety Fund, dues as stipulated in the contract for expenses, and the member's share of the actual death losses incurred in the Men's Division of the Safety Fund Department of the Company. There is, therefore, no reserve and
237 the contract was of no effect when lapsed. There is no liability on the part of the Company on account of this Certificate.

Yours very truly,

T. F. LAWRENCE, *Secretary.*

1 enc.

DEFENDANT'S EX. 1. (Ex. 35 of Deposition.)

Table No. 2.

Year.	Received from members.	Deposited with Security Co.
1880	$20,363.52	$20,363.52
1881	4,673.52 45,702.22	45,698.76
1882	13,097.07 53,799.48	53,234.94
1883	24,873.77 67,112.44	67,586.20
1884	17,139.44 52,257.21	52,351.55
1885	7,950.86 56,712.22	56,720.31
1886	8,902.39 78,537.39	155,166.34
1887	86,152.67	86,136.67
1888	71,730.30	71,745.32
1889	82,075.87	82,075.87
1890	96,260.12	96,160.12
1891	85,610.56	85,645.65
1892	85,053.09	85,037.40
1893	59,190.03	59,170.03
1894	50,453.70	50,554.30
1895	45,688.61	45,688.61
1896	33,011.70	33,011.70
1897	32,582.68	32,582.68
1898	28,296.68	28,296.68
1899	22,485.00	22,484.20
1900	17,169.97	17,619.97
1901	15,068.39	15,068.39
1902	11,206.12	11,206.12
1903	7,313.75	7,313.75
1904	4,304.04	4,304.04
1905	2,074.60	2,074.60
1906	796.00	796.00
1907	930.00	930.00
1908	690.00	691.78
1909	397.50	397.50
1910—May 31	232.50	232.50
	$1,290,345.50	$1,290,345.50

DEFENDANT'S EXHIBIT 2. (Ex. 36 of Deposition.)

Net Income of Safety Fund. (Men's.)

(Received by H. L. I. Co., from Security Company and Distribution Thereof.)

Year.	Receipts.	Disbursements.
1886	$12,675.44	$12,676.44
239 1887	12,082.19	11,976.28
1888	14,507.58	14,668.72
1889	16,214.71	16,214.71
1890	17,328.91	17,328.91
1891	25,111.60	24,840.35
1892	29,542.05	29,402.17
1893	39,589.58	39,909.77
1894	46,378.02	45,999.24
1895	95,156.67	95,189.82
1896	84,131.22	84,770.84
1897	70,265.98	69,375.93
1898	79,415.12	79,166.24
1899	71,642.81	71,085.94
1900	46,795.37	46,352.13
1901	54,571.17	54,929.24
1902	46,633.02	47,697.40
1903	50,546.03	51,232.07
1904	42,081.07	40,722.54
1905	40,869.20	41,464.92
1906	41,975.96	44,499.00
1907	39,395.14	42,002.27
1908	60,286.74	36,730.08
1909	39,288.95	38,802.13
1910—March 31	.....	16,450.14
Balance March 31, 1910		2,997.25
	$1,076,484.53	$1,076,484.53

240 DEFENDANT'S EXHIBIT 3 (EX. 37 OF DEPOSITION).

No. 70627. Amount $2,000. Date April 4, 1885. Age 45.
Life of Herman Ibs. Address 105 Central Ave., St. Paul, Minn.
Lapsed for non-payment of call due June 1, 1910.
Canceled June 23, 1910. Deposit completed January 7, 1886.

Year.	Dividends.	Year.	Dividends.
....	$....	....	$13.22
1885.	....	1896.	2.10
"	....	"	....
"	....	"	1.80
"	....	"	....
1886.	....	1897.	1.60
"	....	"	....
"	....	"	1.36
"	....	"	....
1887.	....	1898.	1.76
"	....	"	....
"	....	"	1.50
"	....	"	....
1888.	....	1899.	1.50
"	....	"	....
"	....	"	1.50
"	....	"	....
1889.	....	1900.	1.00
"	....	"	....
"	....	"	1.00
"	....	"	....
1890.	....	1901.	1.00
"	....	"	....
"	....	"	1.50
"	....	"	....
1891.	....	1902.	1.14
"	....	"	....
"	1.08	"	1.24
"	....	"	....
241 1892.	1.08	1903.	1.34
"	....	"	....
"	1.08	"	1.40
"	....	"	....
1893.	1.26	1904.	1.10
"	....	"	....
"	1.26	"	1.20
"	....	"	....
1894.	1.26	1905.	1.30
"	....	"	....
"	1.34	"	1.20
"	....	"	....
1895.	2.52	1906.	1.40

Year.	Dividends.	Year.	Dividends.
"	....	"	....
"	2.34	"	1.50
"	....	"	....
		1907.	1.20
	$13.22	"	....
		"	1.30
		1908.	1.20
		"	....
		"	1.20
		"	....
		1909.	1.30
		"	....
		"	1.20
		"	....
		1910.	1.40
			$52.46

DEFENDANT'S EXHIBIT 4 (EX. NO. 23 OF DEPOSITION).

U. S. Registered Mails go to every post-office in the world.

Letters and parcels may be registered at any post office or at any post-office station, and by rural carriers throughout their
242 routes. Letters will be registered by letter carriers in the residential districts of cities.

For registered mail delivered through a U. S. post office, the sender receives, without request or extra charge, a return receipt signed by the addressee or his agent. For registered mail delivered in a foreign country the sender receives without extra charge a form of return receipt if the words "Return Receipt Demanded" appear on the envelope or wrapper.

Letter, } No. 4859. P. O. Hartford, Conn.
Parcel }

(Stamp:) Jul- 30, 1910.

Received for registration ——, 190–, from —— ——.
(Stamp:) Hartford Life Insurance Company.
Addressed to Hermann Ibs, St. Paul, Minn.
Receipt demanded.
— class postage prepaid.

POSTMASTER,
Per —— ——.

243 DEFENDANT'S EXHIBIT 5 (Ex. 24 of Deposition).

Hartford Life Insurance Co., Hartford, Conn.
T. F. Lawrence, Secretary.

Registered Mail.
Return Receipt Demanded.

I. C. M.

July 29th, 1910.

Mr. Hermann Ibs, No. 105 Central Ave., St. Paul, Minn.

DEAR SIR: Having received no reply to our letter of July 1st, we return herewith a Money Order for $35.95 which you forwarded the Company to cover the call due June 1st on Certificate No. 70627 on your life. This settlement was made after the Certificate had lapsed, and consequently, could not be accepted without the Company being provided with a satisfactory application for reinstatement. The Certificate now has no value whatever.

As previously advised you, however, the Certificate may be placed in full force and effect providing you make settlement of the overdue call and make a satisfactory application for reinstatement without expense to the Company. If you wish to have the insurance placed in force, forward us a Money Order for $36.95, $35.95 to cover the call referred to above, and $1.00 to cover the cost of the necessary medical reexamination. We will then forward
244 you the proper blank to be used in making application for reinstatement with full instructions for having it executed.

Yours very truly,

T. F. LAWRENCE, *Secretary.*

1 enc.

DEFENDANT'S EXHIBIT 6 (Ex. 25 of Deposition).

(On stamped two-cent envelope:) After 10 days return to The Hartford Life Ins. Co., Hartford, Conn. Mr. Herman Ibs, No. 105 Central Ave., St. Paul Minn.

(Stamped on the face:)

Aug. 6 1910
Second Notice
Aug. 6 1910
4859
Second Notice
Aug. 5 1910
Hartford, Conn.
Jul- 30, 1910
Registered

Returned to writer
Returned to writer
Returned to writer
2232

Registered Mail
Return Receipt Demanded
Hartford, Conn.
Hartford, Conn.

Deceased
322

(On the reverse side:)

Hartford, Conn., Aug. 13, 1910 Registered.
St. Paul, Minn., Aug. 1, 1910, Reg. Div.

245 DEF'T'S EX. 7.

(Exhibit No. 1—Deposition of Thomas F. Lawrence, Ibs. vs. The Hartford Life Ins. Co. W. B. J., N. P.)

Charter of the Hartford Life and Annuity Insurance Company.

At a General Assembly of the State of Connecticut Holden at New Haven, in said State, on the First Wednesday of May, in the Year of Our Lord One Thousand Eight Hundred and Sixty-Six.

Incorporating The Hartford Accident Insurance Company.

Resolved by the Assembly: SEC. 1. That D. F. Seymour, Charles H. Northam, E. N. Kellogg, John A. Butler, C. M. Pond, Austin Dunham, E. H. Fenn, Hiram Bissell, Elisha T. Smith, William Hammersley, E. Thomas Lobdell, Stiles D. Sperry, Milo Hunt, John W. Danforth, Chester Adams, D. A. Rood, George Sexton, Joseph H. Sprague, H. W. Conklin, H. C. Beckwith, F. A. Marcy, C. C. Kimball, James B. Crosby, Julius Converse, H. C. Robinson, J. E. Coleman, Jacob Knous, John R. Buck, and all such persons as hereafter may become duly associated with them as stockholders, their successors and assigns forever, be, and they are hereby constituted a body corporate and politic, by the name of the "Hartford Accident Insurance Company," and by that name
246 shall be and hereby are empowered to purchase, have, hold, possess and enjoy to themselves and their successors, lands, tenements, hereditaments, goods, chattels, effects, real and personal estate of every kind; and the same to sell, grant, alien, convey and dispose of; to sue and be sued, plead and be impleaded in all courts of justice; to adopt and use a common seal, and the same to change at pleasure; and to enact and enforce such by-laws and regulations as they may deem proper for the well ordering and government of said corporation; provided, that such by-laws and regulations be not repugnant to the constitution and laws of this State, or of the United States.

SEC. 2. The capital stock of said corporation shall be not less than two hundred thousand dollars, and at any time hereafter may be increased by said corporation to any sum not exceeding one million dollars, and shall be divided into shares of one hundred dollars each; and each subscriber to said capital stock shall pay into the treasury of said corporation, at the time of subscribing, an installment of ten dollars on each share of stock by him subscribed; and within sixty days after the organization of said company shall secure the payment of the remaining ninety dollars on each share, either by such bonds and mortgages on real estate, or by such endorsed promissory notes as shall be approved of by two-thirds of the directors of said corporation; and the money so secured to be paid, shall be payable in such installments, and at such times, as
247 the directors may determine; and such endorsers shall have a lien on the stock for which such note or notes are given.

SEC. 3. The office of said Company shall be located at Hartford, and all the affairs of said corporation shall be managed and controlled by a board of not less than seven directors, (the number of said directors to be determined by the by-laws of said Company), who shall be chosen from among and by the stockholders, which choice shall be made by a majority of the votes cast; and said directors shall hold office for one year, and until others are chosen in their stead; and the annual meetings for the choice of said directors shall, after the first election, be held at the city of Hartford, on the first Tuesday in May, in each year, or in such other day in the month of May as shall be appointed by the by-laws of said corporation. In the choice of directors as aforesaid, each stock-holder present, or represented by his attorney, shall be allowed one vote for each and every share of stock by him then held; and the stockholders may determine what number of directors may constitute a quorum for business.

SEC. 4. If it shall so happen that an election of directors of said corporation shall not take place at the time of the annual meeting thereof, in any year, said corporation shall not be dissolved thereby, but an election may be had at any time within one year thereafter, the time to be fixed upon and notice given by the directors last chosen, and public notice by order of the directors shall
248 always be given at least ten days previous to any meeting of the stockholders, in a newspaper printed in Hartford, and in such other way as may be deemed expedient; and the president shall have power to call special meetings of the stockholders whenever thereto requested by a majority of the directors.

SEC. 5. The directors may, by a major vote, fill any vacancy which may occur in their board between the annual meetings of the stockholders, by choosing a director or directors from among the stockholders, who shall continue in office until a successor or successors shall be chosen; and the directors may choose a president and vice-president of their corporation from their own number, and a secretary, and may appoint such other officers, clerks and agents, and establish such agencies in this State and elsewhere, as they may deem necessary and convenient, fix their compensation, take bonds of any and all of them for the faithful performance of their duties, make such covenants and agreements as may be deemed necessary, and perform such other acts, and exercise such other powers as they shall deem expedient for the well ordering of the affairs of said Company. The president and vice-president may hold their office for one year, and until others are chosen, but the other officers, agents and servants of said Company may be displaced and new ones appointed at the pleasure of the directors. In the absence or disability of the president, the vice-president shall preside, and if both are absent or disabled, the directors shall choose a president, pro tempore.

249 SEC. 6. Said corporation may insure persons against and make all and every insurance connected with accidental loss of life, or personal injury sustained by accident of every description, on such terms and conditions and for such periods of time,

and confined to such countries and such persons as shall be from time to time ordered and provided for by the by-laws of said corporation; and may make insurance based upon the lives of persons, and may make contracts upon and all conditions appertaining to or connected with life risks; and suits at law may be maintained by any stockholder or person insured by said Company against said corporation, for losses or injuries insured against by said Company, in accordance with the terms of the contract of insurance and the form of the policies issued by said Company, if payment shall be withheld for more than thirty days after the same shall be and become payable by the terms of the policy of insurance or other contract, and after said corporation shall have been duly notified of such loss or injury; and said policies of insurance and all other contracts of said Company may be made with or without the common seal of said Company, and shall be binding and obligatory on said corporation according to the true intent and meaning of such policies or contracts. No stockholders shall be responsible in his private capacity and estate for any debt or liability of said Company, but in case of a violation of the charter, intentionally, or of fraud, the person guilty thereof shall be personally liable to
250 said corporation, or to the assured, as the case may be.

SEC. 7. To carry out the provisions of this act, and to organize the said corporation, Jasper H. Bolton, Stiles D. Sperry and E. Thomas Lobdell are authorized and appointed to receive subscriptions to the capital stock thereof, and the first installment thereon, and are authorized to close the subscription books of said Company when the capital stock shall be fully subscribed, or in case that said capital stock shall be over-subscribed, to distribute and apportion the same among the subscribers as the said persons so appointed as aforesaid to distribute may deem proper. And when the capital stock shall have been subscribed for, and the first installment has been paid thereon, and a notice published in some newspaper printed in Hartford three weeks before the time of meeting, the said subscribers may meet together at the time and place named in said notice, and adopt such by-laws, rules and regulations as may be necessary and convenient for commencing and carrying on business under this act. They may also, at the same or subsequent time, choose a board of directors in the manner hereinbefore provided, who shall hold their offices, with all the powers given to directors by this act, until others are chosen to supply their places. And when the by-laws have been adopted, and the directors have been chosen as aforesaid, and when the board of directors shall have been organized by the choice of a president and secretary, the said corporation may exercise all the powers and privileges con-
251 ferred by this act.

SEC. 8. This resolution shall take effect from the date of its passage, and may be altered, amended or repealed at the pleasure of the General Assembly.

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At a General Assembly of the State of Connecticut Holden at Hartford, in said State, on the First Wednesday of May, in the Year of Our Lord One Thousand Eight Hundred and Sixty-seven.

Amending the Charter of the Hartford Accident Insurance Company.

Upon the petition of the Hartford Accident Insurance Company, of Hartford:

Resolved by this Assembly: SEC. 1. That the name of said Company be, and the same hereby is, changed to that of the Hartford Life and Accident Insurance Company.

SEC. 2. All actions, or causes of action, suits or demands, of any and every kind; and all the rights, duties and privileges; and all the estate, real, personal, or mixed; and all debts due to and from said Company; under the name of the "Hartford Accident Insurance Company," shall be and remain to and against said Company, by the name and style of the "Hartford Life and Accident Insurance Company," the same as if said original name had not been changed.

SEC. 3. The capital stock of said Company existing and established under the name of the "Hartford Accident Insurance Company," as well as that which shall be created hereafter under
252 the name of the "Hartford Life and Accident Insurance Company," shall be held subject to and transferable in accordance with the charter and by-laws of said Company, the same as if the name of said Company had not been changed. And the subscribers or holders of said capital stock shall make payment for the same in such installments, and at such times and places as the directors shall determine. And if any subscriber, or any holder of any share or shares of said capital stock shall neglect or refuse to pay any installment as aforesaid, or shall neglect or refuse to secure the payment of any unpaid portion of his stock as aforesaid, for the space of thirty days after the same shall be required or become due, and after he or they have been notified thereof in accordance with the by-laws, the stock of such negligent stockholder may be sold by the directors, at public auction, at the Brokers' board in the city of Hartford, or elsewhere, as the directors shall elect; and of any such sale notice shall be given, at least twenty days prior to the sale, by one or more publications in some newspaper printed in Hartford; and the proceeds of such sale shall be first applied in payment of the installment or installments called for, and the expenses attending the sale, and the balance, if any, shall be refunded to the owner of said stock; and such sale shall in all respects entitle the purchaser to all the rights of a stockholder, to the extent of the shares so bought.

253 SEC. 4. Said company may issue policies for the benefit of, and payable to, any married woman, or child or children; and any contract of insurance, thus issued, by whomsoever the same may have been procured, shall be to the extent expressed in the policy, the sole and separate estate of the married woman, child

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or children, to whom the policy, by its terms, shall be payable. And the discharge of such policies by such married woman or her assigns, or by such children (or their guardians if minors), shall be a valid discharge of the same. And said company shall be, and hereby is authorized to re-insure any and all risks taken under its charter, and upon such conditions as may be prescribed or approved by the directors.

SEC. 5. Said company may from time to time invest, collect and re-invest the whole or any portion of its capital and assets, in any bonds or stocks of the United States, or of any of the States of the United States, or of any corporations which are or may be created under authority of the United States or of any of said States; or in notes or bonds, secured by mortgage of real estate or otherwise; as shall be approved by the directors and in conformity with the charter and by-laws of said company.

SEC. 6. It shall be the duty of said company to reserve out of its receipts an amount sufficient to re-insure all its outstanding life-risks of whatever description, other than mere accident risks said amount to be computed upon an assumption of mortality at the rates known as the "Actuaries'" or "Combined Experience"
254 rates, and at a rate of interest of not less than four per cent nor more than five per cent. per annum, as the directors shall from time to time determine; and such reserve shall be exempt from any liability for losses or claims arising from any general accident policy or contract insuring against death or disability caused by accident; and no dividend or interest shall be paid to either stockholders or policy-holders by which payment said reserve would be reduced below the minimum amount required by the provisions hereof. Provided, that nothing herein shall be construed to exempt the capital stock of the company from liability for all its contracts.

Approved, May 22d, 1867.

At a General Assembly of the State of Connecticut, Holden at New Haven, in said State, on the First Wednesday of May, in the Year of Our Lord, One Thousand Eight Hundred and Sixty-Eight:

Amending the Charter of the Hartford Life and Accident Insurance Company.

Upon the petition of The Hartford Life and Accident Insurance Company, of Hartford:

Resolved by this Assembly: SEC. 1. That the name of said Company, be, and the same hereby is changed to that of the Hartford Life and Annuity Insurance Company.

SEC. 2. All actions or causes of actions, suits or demands of any and every kind, and all rights, duties and privileges, and the estate, real, personal or mixed, and all debts due to or from said
255 Company under the name of the "Hartford Life and Accident Insurance Company," shall be and remain to and against said Company, by the name and style of the "Hartford Life

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and Annuity Insurance Company," the same as if their said name had not been changed.

SEC. 3. Said Company are authorized and empowered to grant or purchase annuities, confer endowments and make contracts, upon any and all conditions appertaining to, or connected with life risks, annuities and, reversionary interest of whatever kind or nature.

SEC. 4. This act shall take effect from and after its passage.

Approved, June 17th, 1868.

At a General Assembly of the State of Connecticut, Holden at Hartford, in said State, on the Wednesday after the First Monday, in January, in the Year of Our Lord, One Thousand Eight Hundred and Seventy-Nine:

Authorizing a Reduction of the Capital Stock of the Hartford Life and Annuity Insurance Company.

Resolved by this Assembly: That the Hartford Life and Annuity Insurance Company, Hartford, Connecticut, be, and they hereby are, authorized to reduce their Capital Stock from the sum of three hundred thousand dollars to an amount not less than two hundred and fifty thousand dollars.

Approved, February 27, 1879.

256 At a General Assembly of the State of Connecticut, Holden at Hartford, in said State, on the Wednesday After the First Monday, in January, in the Year of Our Lord One Thousand Eight Hundred and Eighty-Two:

Amending the Charter of the Hartford Life and Annuity Insurance Company.

Resolved by this Assembly: That section six of an amendment to the charter of the Hartford Life and Annuity Insurance Company, approved May twenty-second, 1867, shall be and hereby is amended to read as follows:

SECTION 6. It shall be the duty of said company to reserve out of its receipts an amount sufficient to reinsure all its outstanding life risks of whatever description other than mere accident risks, and other than such contracts as it has made or may make wherein the sum payable upon the death of the person named in any such contract is made contingent upon an assessment collected from the associate holders of such contracts, said amount to be computed upon an assumption of mortality at the rates known as the actuaries' or combined experience rates, and at a rate of interest of four per cent. per annum; and such reserve shall be exempt from any liability for losses or claims arising from any general accident policy or contract insuring against death or disability caused by accident, and no dividend or interest shall be paid to either stockholders or policy-

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holders by which payment said reserve would be reduced
257 below the minimum amount required by the provisions hereof; provided, that the capital stock of the company shall be liable for all its contracts without exemption by reason of anything herein contained.

Approved, April 25, 1882.

At a General Assembly of the State of Connecticut, Holden at Hartford, in said State, on the Wednesday After the First Monday in January, in the Year of Our Lord, One Thousand Eight Hundred and Ninety-Seven:

Changing the Name of the Hartford Life and Annuity Insurance Company to the Hartford Life Insurance Company.

Resolved by this Assembly: SECTION 1. That the corporate name of the Hartford Life and Annuity Insurance Company, a corporation located and doing a life insurance business in Hartford, in this State, be and the same is hereby changed to the Hartford Life Insurance Company, by which name it shall be hereafter known and called.

SECTION 2. All contracts, rights, obligations, property, privileges, and franchises of the said Hartford Life and Annuity Insurance Company shall be and remain unimpaired and vested in the corporation under its new name.

Approved, March 3, 1897. Adopted, May 11, 1897.

258 At a General Assembly of the State of Connecticut, Holden at Hartford, in said State, on the Wednesday After the First Monday in January, in the Year of Our Lord, One Thousand Nine Hundred and Three:

Amending the Charter of the Hartford Life Insurance Company.

Resolved by this Assembly: SECTION 1. That the Hartford Life Insurance Company is hereby authorized to insure persons against loss of time and expense resulting from disease.

SECTION 2. This resolution shall take effect when approved by a majority vote of the stockholders of said Company, and a certified copy of said vote of approval shall be lodged on file in the office of the Secretary of the State.

Approved, May 12, 1903.

STATE OF CONNECTICUT,
Office of the Secretary, ss:

I, Matthew H. Rogers, Secretary of the State of Connecticut, and keeper of the seal thereof, and of the original record of the Acts and Resolutions of the General Assembly of said State, do hereby certify that I have compared the annexed copy of the Resolution incorporating the Hartford Accident Insurance Company and the several

amendments thereto with the original record of the same now remaining in this office, and have found the said copy to be
259 a correct and complete transcript thereof.

And I further certify, that the said original record is a public record of the said State of Connecticut, now remaining in this office.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said State, at Hartford, this 23rd day of September, 1909.

(Signed) MATTHEW H. ROGERS,
[SEAL.] *Secretary.*

DEFT'S EX. 8.

New Haven County Superior Court, March 23, 1910.

CHARLES H. DRESSER OF Hartford, Connecticut; WILBUR SQUIRE of Meriden, Connecticut; Hugh J. Wiley of New Haven, Connecticut; F. L. Perdue of Terre Haute, Indiana; E. W. Amsden of Ormond, Florida; R. H. Davidson of Ballston Spa, New York; H. McClary of Southington, Connecticut; R. N. Stanley of Highland Park, Connecticut; A. J. Bostwick of Sharon, Connecticut; Charles Donnelly of Covington, Kentucky; Joseph Bradford of Norwich, Connecticut; William H. Adams of Worcester, Massachusetts; Henry A. Weber of Detroit, Michigan; W. J. Gordon of Cincinnati, Ohio; W. C. Van Loon of CinCinnati, Ohio; C. A. Roebuck of Williamstown, Massachusetts; O. S. Chapman of Minneapolis, Minn.; J. M. Bugg of Chipley, Georgia; Charles
260 Ammen of New Orleans, Louisiana; Adolph Schmidt of Brooklyn, New York; A. B. Smith of Morristown, Vermont; William Booth of Clinton, Illinois; W. A. Oldham of Springfield, Missouri; C. H. Robinson of St. Paul, Minnesota; Porter Farley of Rochester, New York; Herbert Myrick of Springfield, Massachusetts; A. B. Stockwell of Windsor Locks, Connecticut; W. L. Dodds of Buffalo, New York; O. W. Kerner of Kernersville, North Carolina;

v.

THE HARTFORD LIFE INSURANCE COMPANY OF HARTFORD, Connecticut; Security Company of Hartford, Connecticut; George E. Keeney of Somersville, Connecticut; Lewis Sperry of East Windsor Hill, Connecticut; Rienzi B. Parker of Hartford, Connecticut; Lewis E. Gordon of Hartford, Connecticut; Everett J. Lake of Hartford, Connecticut; James H. Knight of Hartford, Connecticut; Raymond G. Keeney of Hartford, Connecticut; and Andrew Gordon of Hazardville Connecticut.

Judgment.

This action was brought by the plaintiffs in their own behalf and for the benefit of other creditors and certificate holders in similar situation as themselves against the defendants named in the com-

plaint claiming that prior to 1880 there had been invented a plan of assessment life insurance which was designated as the Safety Fund
Plan, and published and generally known under that name,
261 the principal features of which plan are described as follows:
Each person applying for insurance under the plan was to pay an admission fee of $8 for $1,000; $12 for $2,000; $15 for $3,000; $18 for $4,000; $20 for $5,000; and $40 for $10,000, and a medical examination fee estimated at $3, which medical examination fee was to be paid to the physician; also to pay annually, for the sole purpose of paying the expense of said insurance on said Safety Fund Plan, $3 for each $1,000 of insurance, also to pay as mortuary payments or assessments to meet death losses an amount graduated according to the policy-holder's age, when the assessment was made the amount of his policy, and the total amount of insurance or indemnity in force with the company. Furthermore, each member was to pay $10 on each $1,000 of his insurance to make up a "Safety Fund." This Safety Fund was to be deposited with the defendant, The Security Company of Hartford, Connecticut, as trustee. As often as the receipts for said fund amounted to a sufficient sum to purchase $1,000 par value of United States bonds such trustee was to make investments of such funds therein and register the same in its name as trustee of the Safety Fund of said insurance company. The earnings of this Safety Fund after it reached $300,000, and all contributions to said fund after it reached $1,000,000 in United States bonds par value, were to be divided up among the outstanding certificate-holders whose certificates had been in force five years in proportion to the face amount
of their certificates. In case of failure of any certificate-
262 holder to make payments in accordance with his agreement,
his interest in said Safety Fund and all his claims were to cease; and when the face amount of outstanding certificates was less than $1,000,000 it should be divided among the outstanding certificate-holders in proportion to the face amount of their certificates. And further said sum was to belong absolutely to the certificate-holders and the company was to have no interest whatsoever therein, except in its application for the benefit of the certificate-holders in accordance with the terms of said plan. And claimed that at some time in the year 1880 the defendant, the Hartford Life Insurance Company, adopted said plan and issued certificates in accordance with the terms thereof; and that the plaintiffs and a large number of others held certificates issued in accordance therewith and similar to Exhibit "B" annexed to said complaint; and claimed that in pursuance of certain purposes for its own benefit said insurance company offered various inducements to induce the certificate-holders in its Safety Fund department to surrender their certificates in said department and to take out in place thereof policies in the stock department of said company, and that said insurance company had diverted from the moneys and property of said Safety Fund department large sums of money to use and benefit of itself and the managers and stockholders of its stock department, and made other allegations, as will appear from said complaint and asked relief as

therein set forth. Said action came to this Court on the first
263 Tuesday of November, A. D. 1906, and thence by continuance to the first Tuesday of January 1907, when and where the parties appeared and were at issue on demurrers as on file, and the Court on the 11th day of October, 1907, sustained said demurrers and adjudged that the complaint was insufficient, and that the defendants recover the costs and thereupon the plaintiffs appealed from said judgment to the Supreme Court of Errors to be held at Bridgeport within and for the Third Judicial District on the fourth Tuesday of October, A. D. 1907, and said Court having heard said case rendered judgment on June 9, 1908, finding error and overruling said demurrers in part and sustaining said demurrers in part, and remanding said cause to this Court for further proceedings as will appear in said judgment; and thereupon the defendant, the Security Company, filed its answer as on file, and the other defendants filed their answers as on file, and the case was heard on the demurrer of the plaintiffs to the answer of the Security Company, and the Court on the 17th day of December, 1908, rendered its decision sustaining the demurrers to the first, second and third defense of said answer, and overruling the demurrer to the fourth defense; and the case thereupon came by regular continuances to this Court on the ? day of January, 1909, when the Court made an order that the issues raised by the 21st paragraph of the answer of the Insurance Company to the 29th paragraph of the complaint, and paragraph 10 of the plaintiffs' reply to said answer, be
264 heard and determined before any other issues were tried, and thence said case came by regular continuance to the 27th day of May, A. D. 1909, when the parties were at issue as on file, and thereupon a hearing was had on said issues, but the said The Security Company did not appear, and the Court (Judge Shumway presiding) after said hearing filed a memorandum of decision as on file under date of July 21, 1909, and on March 23, 1910, formally entered judgment as on file to conform to the date of this judgment; and thence said cause came to this Court on the 10th day of November, A. D. 1909, when all the parties duly appeared and were heard on the other issues in said case not disposed of by the aforesaid judgment, and the Court having heard the parties finds certain issues in favor of the plaintiffs and certain others in favor of the respective defendants, as herein set forth, and at the request of the plaintiffs specially sets forth the facts upon which the judgment is founded as follows:

The Safety Fund plan of insurance under which the certificates in this case were issued, and with which they comply in terms, is substantially as follows: Each person applying for insurance under the plan was to pay an admission fee of $8 for $1,000; $12 for $2,000; $15 for $3,000; $18 for $4,000; $20 for $5,000; and $40 for $10,000, and a medical examination fee estimated at $3, which medical examination fee was to be paid to the physician; also to pay annually expense dues of three dollars for each $1,000 of insurance, also to pay as mortuary payments or assessments to
265 meet death losses an amount graduated according to the policy-holder's age, when the assessment was made, the

amount of his policy, and the total amount of insurance or indemnity in force with the company. Furthermore each member was to pay $10 on each $1,000 of his insurance to make up a Safety Fund. This Safety Fund was to be collected by the defendant, The Hartford Life Insurance Company, and by it deposited with the defendant, The Security Company of Hartford, Connecticut, as trustee. As often as the receipts for said fund amounted to a sufficient sum to purchase $1,000 par value of United States bonds such trustee was to make investments of such funds therein and register the same in its name as trustee of the Safety Fund of said Insurance Company until said fund so invested would amount to one million dollars par value of United States bodns. The earnings of this Safety Fund after it reached $300,000 and all contributions to said fund after it reached $1,000,000 in United States bonds, par value, were to be paid over by said Security Company to said Insurance Company and by it be divided up among the outstanding certificate-holders who had contributed five years prior to the date of any such division their stipulated proportion or payments to said fund, in proportion to the face value of their certificates.

In case of failure of any certificate-holder to make payment in accordance with his agreement, his interest in said Safety Fund and all his claims thereon ceased. When the face amount of
266 outstanding certificates becomes reduced by death, lapse or other cause to the amount of one million dollars, the disposition of said Safety Fund in such case was adjudicated by this Court in the judgment referred to above rendered by this Court, Judge Shumway presiding, as appears therein.

The Security Company and the Hartford Life Insurance Company on December 31, 1879, and before the Hartford Life Insurance Company commenced the issue of such certificates, executed an agreement, a copy of which is incorporated in each certificate and is found incorporated in Exhibit "B" in this case under which agreement the Security Company assumed the management of the Safety Fund in accordance with the terms of the contract contained in the certificate and with the plan as thus set forth and continued the management of such business in accordance with the terms of the agreement down to a period in 1890.

At the solicitation and by the procurement of the Hartford Life Insurance Company the Legislature of 1889 passed a private act, approved April 10, 1889, which is as follows:

"Resolved by this Assembly: That the Security Company, a corporation located in Hartford, be and it is hereby authorized to invest the funds known as the Safety Fund, which it now holds or may hereafter receive from the Hartford Life and Annuity Insurance Company, a corporation also located in said Hartford, under a contract between said companies dated the thirty-first day
267 of December, 1879, in trust for the benefit and security of certain holders of certificates of membership in said Hartford Life and Annuity Insurance Company in such other securities, in addition to United States bonds, as the life insurance companies of this State are by law authorized to invest in, instead of being

compelled to invest all said funds in United States bonds as specified in said contract; provided, such investments of said funds in other securities than United States bonds shall be made with the consent and approved of said Hartford Life and Annuity Insurance Company; and provided further, that nothing in this resolution shall be so construed as in any way to vary, alter or change the purposes, conditions or stipulations of such trust as set forth in said contract, except as to the kind of securities in which the same may be invested."

Thereafter the Security Company did not comply with the provisions of the contract executed in December, 1879, in regard to investments. It never accumulated a fund of one million dollars, par value, of United States bonds, although it did accumulate a fund which in June, 1894, amounted to one million dollars value of securities. Relying in good faith on the provisions of the act of 1889 above quoted, in the year 1890, it sold United States bonds amounting to $501,000 par value then held by it under the terms of said trust agreement and received therefor $97,366.85 over and
268 above the par thereof, which United States bonds had been purchased at a premium of $115,689.50, making the whole cost of the said bonds $616,689.50. Said Security Company thereupon in accordance with the provisions of said act of 1889, but in violation of said contract with said certificate-holders made in 1879 as aforesaid, invested the proceeds of such sale, together with other Safety Fund payments thereafter received, in such other securities as are required for the investment of insurance companies under the laws of this State, but not in United States bonds as provided in said agreement. The amount of money so received and invested, together with the premiums paid, including the premiums paid on the United States bonds so converted, amounted to much more than one million dollars, to wit, upwards of $1,090,000.

Said act of 1889 above stated has been ruled by this Court on demurrer to the answer of the defendant, the Security Company, to be unconstitutional as impairing the obligation of the contract embodied in the trust agreement with the certificate-holders.

As a result of such investments in other securities losses have been incurred, and the actual value of said fund now remaining in the hands of the Security Company on account of said Safety Fund is somewhat less than one million dollars. Many of said securities are not such as are authorized by the law of this State concerning the investments by trustees, as appears by the disclosure of the
269 Security Company on file in this case, and some of these securities have today no market value and are paying no income.

This Court however finds that the illegal investments made by the Security Company under the provisions of the private act of the General Assembly of 1889 were not made to further any purpose of its own, but were made in reliance upon said act which was passed in the supposed interest of the beneficiaries, or certificate-holders; that such illegality differs from illegality knowingly or negligently indulged in; that the loss which has fallen upon the Security Com-

pany from such illegal investments of the Safety Fund has its source in misfortune and not in culpability.

By reason of the change so made in the investments of said Safety Fund, there was received as income by said Security Company down to the commencement of this action, $315,828.41 in excess of what the income would have been had said United States bonds not been sold and all investments of said Safety Fund had been made by the trustee only in United States bonds.

Practically the only issue of United States bonds in the market for sale from January, 1890, to March, 1895, were the four per cent. bonds maturing April 1, 1907. The market price of said bonds in January, 1890, was 126½ of par and the price thereof gradually fell from time to time until March, 1895, when a new issue was made of four per cent. bonds to mature in 1925. The market price of said four per cent. bonds of 1907 then ranged from 111 to 112¾
270 of par, and the market price of said four per cent. bonds of 1925 ranged from 119⅛ to 120½. The Security Company was not required to establish a sinking fund. The agreement makes no reference to such a fund, although United States bonds were then (December, 1879) at a small premium of about three per cent.

The situation presented by the beneficiaries was not analogous to that of a life tenant and remainderman, but was more nearly like a beneficiary entitled to the interest, and eventually to the principal of a fund. It was as important for the early certificate-holders to receive all the income as that a sinking fund should be established to lighten the possible burden that might fall on certificate-holders at the maturity of the bonds, if the $10 payments then received were applied to the purchase of bonds to restore the Safety Fund to $1,000,000, par value, of United States bonds. A continuation of the business was then contemplated with a constant flow of $10 payments into the Security Company from new certificate-holders. By having no sinking fund, the total net income went to the beneficiaries instead of a part of it into an investment to await the maturity of the bonds, thus in effect the beneficiaries became the holders of a sinking fund, since if at maturity more than the $1,000,000 was necessary to procure $1,000,000 par value, of United States bonds, it would come from them in diminished returns from the $10 payments or in case (as happened) the business was not con-
271 tinued then equitably from diminished payments of income until the fund was restored. As a matter of fact, at the maturity of the bonds of 1907, United States bonds paying two per cent. could have been purchased nearly at par.

Under the investment policy pursued after 1889, a much larger sum arising from unused $10 payments was returned, and much earlier, to the use of certificate-holders, and also a much larger amount of income was so returned, than would have been returned if the investments had been made in United States bonds.

By the terms of said trust agreement above referred to, it appears that the Security Company agreed with the Hartford Life Insurance Company and with the certificate-holders, that "the necessary expenses connected with the management of said fund shall be

limited to the ordinary commissions for purchasing or selling and transfer or transmission of the hereinafter mentioned bonds, together with the cost of the stationery and postage used in replying to requests for information of the condition of said fund, and the actual cost of any judicial action needed to determine the legal status of said fund. All other expenses to be included in and covered by such reasonable charges as shall be made for the compensation of the trusteeship, to be determined by the amount of time and labor involved in the execution thereof."

On the date of the execution of said trust agreement, the Security Company by its president and secretary wrote a letter to the president of the Insurance Company, and the same day the In-
272 surance Company by its president and secretary wrote a similar letter to the president of the Security Company, in both of which it was stated that it was agreed that the compensation referred to in said contract should be as follows: "The rate to be one per cent. on all sums up to and not exceeding $200,000, but in no
272 surance Company by its president and secretary wrote a year to be less than $500.00; and from $200,000; to $400,000 to remain at $2,000 per annum; and on all amounts exceeding $400,000 to be one-half of one per cent. per annum."

This was done before any certificate of membership had been issued by the Insurance Company and before any opportunity had been had to determine the amount of time and labor involved in the execution of the trusteeship.

Thereafter, at the end of each six months, the Security Company computed its compensation under its interpretation of said agreement with the said Insurance Company, and submitted said compensation to said Insurance Company for its approval, and, if so approved, it withdrew said amount and took the same as its compensation as trustee for the preceding six months.

No complaint was ever made of this compensation by any certificate-holder down to the commencement of this suit, but it did not appear that the certificate-holder knew of the rate or amount of compensation which said trustee had received or was receiving.

The amount of income collected under said trust agreement by the Security Company was $970,175.83 down to September 18,
273 1908, and the Security Company, acting under its interpretation of the terms of said letter, received and credited to itself as compensation, with the consent of said Insurance Company, and deducted from said income, the amount of $116,741.16, being more than twelve per cent. of the income, and then paid over to the Insurance Company for credit on the assessments of the certificate-holders in accordance with the terms of the contract, the balance of the income after deducting its compensation and other expenses, the latter amounting in all to over fifteen thousand dollars.

Since 1892 the stated compensation of the trustee has been calculated and received on amounts which in each year exceeded one million dollars.

The ordinary compensation of a trustee for holding and managing trusts consisting of personal property is five per cent. of the income.

Under the contract, the Security Company, down to March, 1899, in addition to taking care of and managing said Safety Fund, and turning over the income to the Hartford Life Insurance Company semi-annually, in pursuance of the contract, kept an account of the ten dollar payments with the names and addresses of the certificate-holders from whom said ten dollar payments were received. Since January 1, 1891, the fair value of the services of the trustee does not exceed eight per cent. of the gross income of the fund for each year, but its charges for such services have largely exceeded that amount.

The amount of such excess, together with simple interest
274 thereon calculated from the close of each year, when such charge was made, amounts to $40,046.36.

And this Court further finds that said Security Company was not obligated under the terms of said trust agreement with the Hartford Life Insurance Company and with the certificate-holders, to maintain a sinking fund.

That the act of the General Assembly of 1889, to which reference is made above, was passed without notice to, or the consent of, the holders of certificates of insurance issued by said Insurance Company, and was unconstitutional and void; that if the Safety Fund is now invested in United States bonds an annual income of less than two per cent. will be received on the amount so invested, and that if said fund is now invested in securities (other than United States bonds) in which the law of this State authorizes trustees to invest trust funds, an approximate annual income of four per cent. will be received on the amount invested, and that it is within the power of this Court of Equity to protect the said certificate-holders from the great and unnecessary loss and waste of approximately twenty thousand dollars per year, which loss and waste will result if said Safety Fund is now invested in United States bonds.

It was claimed by the plaintiffs that the defendants were levying assessments unnecessary in amount and number for their own wrongful purposes. The Hartford Life Insurance Company levied the assessments provided for in the plan and in the certificate
275 above set forth, quarterly, and the proceeds of such assessments when received by said Insurance Company were paid into and credited to the mortuary fund described in the contract of insurance. The Hartford Life Insurance Company did not levy assessments unnecessary in amount or number. It appeared, however, that the allowance made for discontinuance of membership, although made in good faith, often exceeded the actual amount necessary to cover the deficiency in payments arising from such discontinuances, and that from that source margins of excess of payment arose from time to time consisting of the difference between the aggregate amount actually received by said Insurance Company from such quarterly assessment and the amount needed to pay the losses for the corresponding quarterly period. It also appeared that although the Company in practice levied assessments to cover the full amount of the face value of the certificates for each death during the previous quarter, they deducted an actual payment from the face of such certificates a certain proportion of the assessment which

would have been due from the certificate-holder had he survived the quarter, which sum is proportioned to the portion of such quarter which had elapsed at the time of the death of such certificate-holder, and there was, therefore, a margin arising from this circumstance between the amount of the losses paid and the amount of the losses assessed for. These margins accumulated from time to time in the hands of the Hartford Life Insurance Company in its mort-
276 uary fund, have always been and are now in constant use in the prompt payment of losses in advance of the receipt of the moneys to pay the same from the regular assessments, by which receipts the said fund is constantly reimbursed. Said accumulation of margins, although in constant use, are capable of exact determination in amount, and now amount to many thousands of dollars.

The plaintiffs claimed it was improper and wrongful to accumulate these margins and to carry this balance in said mortuary fund, and claimed that said balance of margins should be distributed among the outstanding certificate-holders, but it is held that it is proper and reasonable that the Company should hold some such fund for the purpose of enabling it to pay losses promptly, but it is not necessary for that purpose that the Company should hold more than the amount of one average quarterly assessment for the previous year.

Said fund belongs to the certificate-holders and is held in trust for them, and the Hartford Life Insurance Company has the right to hold the same, to the extent above stated, in trust for said certificate-holders and for application to the settlement of death claims and said funds should be ultimately distributed in the settlement of death claims and as hereinafter provided, before said certificates in accordance with their provisions are extinguished and the safety Fund distributed in accord with the judgment of this court. Judge Shumway presiding, above referred to. It is provided in the
277 certificates that they are payable solely from the mortuary fund. It is also provided by the certificates and by the trust agreement hereinbefore referred to- that on the distribution of the Safety Fund among the certificate-holders, all liability on the certificates shall thereupon cease and determine.

It was claimed by the plaintiffs that the expense dues received by the Hartford Life Insurance Company could be levied only for the purpose of paying the expenses of the Safety Fund Department of the Hartford Life Insurance Company, and that as the Company ceased to issue new certificates and transact new business at a period not later than 1899, the Hartford Life Insurance Company was not entitled to said expense dues after that period, and that the plaintiffs were entitled to an account for the amount of such expense dues received after the payment of the expenses actually incurred by the Hartford Life Insurance Company in connection with the business. It has been ruled by the Supreme Court of this State, and is so held by this Court, that said three dollar expense dues did not become a part of the funds of the Safety Fund Department, but that they belong to the Insurance Company without accountability

to the certificate-holders, and that said Company is entitled to collect the same so long as there is any outstanding certificate of insurance. The plaintiffs made no claim at the time of the trial for any such account of said expense dues, and made no claim for relief on account of the collection or receipt of the same, and the plaintiffs are not entitled to any such relief.

278 It was also claimed that the Insurance Company had from time to time diverted moneys and property of the Safety Fund Department from such Safety Fund Department to the Stock Department without right.

The plaintiffs after submitting evidence on the trial in support of said claim withdrew their demand therefor and admitted that the circumstances appearing to indicate such diversion arose from the difference in the method of keeping accounts appearing by their reports to the Insurance Department, and it is found that the Insurance Company has not wrongfully diverted such sums from the Safety Fund Department to the uses of the Stock Department.

It was claimed by the plaintiffs that the defendants other than the corporations, as officers and agents of said Insurance Company, took their offices with knowledge of the various wrongful and fraudulent acts recited in the complaint, and had accepted the benefits of said fraudulent transactions. But it is held that said defend, namely, George E. Keeney, Lewis Sperry, Rienzi B. Parker, Louis E. Gordon, Everett J. Lake, James H. Knight, Raymond G. Keeney, Andrew Gordon, Arthur F. Eggleston and Charles H. Bacall became connected with said defendant Insurance Company and took their positions in said Company at a date subsequent to the acts complained of and recited in said complaint, and have not participated in and are not guilty of any fraudulent acts or transactions in connection with the management of the

279 Safety Fund Department of said Insurance Company.

Plaintiffs are not entitled to an account, a receiver, damages, or other relief except as herein granted.

Defendants Charles H. Bacall and Arthur F. Eggleston died after the commencement of this action and before any judgment was rendered therein.

Whereupon it is adjudged and decreed, that said mortuary fund of the Men's Division arising from the excess of the amount received for quarterly assessments over the amount necessary for the payment of losses for said quarter, as above described, or from any other source, together with all income or interest thereon, belongs to the certificate-holders in the Men's Division of the Safety Fund Department, and the Insurance Company is reasonably entitled to hold the same as a necessary and proper fund for the settlement of death claims on the certificates of insurance in said department.

Further, that in the future, any excess in said fund above the average of the four preceding quarterly assessments in said Men's Division of the Safety Fund Department of said Company shall be distributed to the certificate-holders in diminution of assessments by crediting and applying such excess on account of the next succeeding assessment.

Also, that when the amount of outstanding certificates of insurance in the Men's Division of the Safety Fund Department falls to the face amount of one million dollars and the Safety Fund is
280 distributed among the holders of said certificates, the balance, if any, of said mortuary fund remaining in the hands of the Hartford Life Insurance Company, shall be distributed pro rata among the certificate-holders whose certificates are outstanding at that time.

That said Security Company as such trustee within eighteen months from and after July 1, 1910, shall sell and dispose of all present securities and investments of said Safety Fund, other than those which it shall be willing to hold as securities authorized by law, for trust investments, and shall invest the proceeds of such sales in such securities (other than United States bonds) in which trustees are allowed to invest under the law of the State of Connecticut.

That said Security Company, as such trustee, may and shall continue to hold as a part of said Safety Fund, any and all securities (other than United States bonds) in which said fund is now invested, and which constitute investments in which trustees are authorized by law to invest, and which said trustee shall decide to retain as a part of said Safety Fund.

That all of said trust securities which shall be retained by said Security Company in said Safety Fund, shall be valued and so held at their market value at the date of this judgment, and that all securities hereafter purchased by said trustee as a part of the investments of said Safety Fund shall be taken and held as a part of said Safety Fund at their cost price.

281 That as to all bonds or obligations payable at a fixed time in the future which shall be so retained or hereafter purchased by said trustee as a part of said Safety Fund, the Security Company shall create and carry a sinking fund out of the income of said respective securities for the amortization of the premiums or bonuses above par, which there may be in the valuation or cost of said securities.

In case the present market value of all the securities which are now held by said trustee and which it shall retain as a part of said Safety Fund, together with the cost price of all securities purchased by said trustee under the provisions of this judgment, shall not equal the sum of one million dollars on or before January 1, 1912, then said Security Company, out of its own funds, shall furnish and pay into the principal account of said Safety Fund a sum sufficient to make said fund up to one million of dollars, which sum so paid in (if any) shall be invested by said trustee in securities in which trustees shall then be authorized by the law of this State to invest.

That said trustee hall have the right and power to sell and transfer from time to time any securities which it may hold in said fund, and shall invest the proceeds of said sales in other securities in which said trustees shall be authorized to invest.

That the Security Company credit to the income account of the Men's Division of the Safety Fund Department, the sum of forty thousand and forty-six dollars and thirty-six cents ($40,046.36)

being the excess of the amount hitherto received by it over
282 the compensation which this Court has allowed, with interest thereon as above described.

That the Security Company hold said sum of forty thousand, forty-six and 36/100 dollars ($40,046.36) as a separate fund until the conversion of the securities as provided above, and if under this judgment the Security Company is compelled to make up from its own funds any of the principal of the Safety Fund, then the Security Company is authorized and directed to apply such sum of $40,046.36, with the accumulated interest realized thereon from the date thereof, in whole or in part to reimburse said Security Company, so far as may be, for the sum so made up by it. If after the conversion of the securities and the reestablishment of the Safety Fund as provided above, the whole or any portion of said $40,046.36 remains unapplied for the purpose of so reimbursing said Security Company, the Security Company is directed to retransfer it to the regular income account of the Safety Fund.

That when the conversion and purchase of securities is completed as hereinbefore authorized, the Security Company shall file in this Court a report or account of its proceedings in detail, sworn to by one of its executive officers, and which shall show an investment of one million dollars as the principal of said Safety Fund, and the payment of any excess under this judgment, to the income account of said Safety Fund.

That the said Security Company from this time henceforth shall be entitled to charge and receive for its services as such trustee
283 a sum equal to eight per cent. of the gross income received from said investments, to be paid in semi-annual payments of four per cent. each.

In addition to said eight per cent. of the gross income as compensation, and in addition to such expenses as are authorized by said trust agreement of December 31, 1879, said trustee shall be entitled to be reimbursed for all necessary legal expenses incurred in the protection, and collection of any obligation which shall at any time be held under the authority of this judgment as a part of the principal of said Safety Fund.

It is further adjudged that this litigation is of such a character and the results of such value to all the present certificate-holders who as a class are interested in this litigation that an allowance should be made from the accounts of the safety fund in aid of the plaintiffs in the payment of the expenses, including the attorney's fees, involved in the conduct of this litigation.

Whereupon it is further adjudged that said Security Company pay to Henry Stoddard, Talcot H. Russell, and John K. Beach, attorneys for the plaintiffs, on or before the expiration of ten days after the judgment in this case shall become final, the sum of twenty-five thousand dollars ($25,000), which sum shall be paid out of the principal of said Safety Fund now in its hands, which shall be applied by the plaintiffs and their said counsel to aid in the settlement of the expenses and attorneys' fees of the plaintiffs

in this action, for which the said plaintiffs shall give to said
284 Security Company a receipt certifying to said payment in accordance with this judgment, which certificate shall be carried by said trustee as a part of said principal of the Safety Fund, for reimbursement as hereinafter provided, and said payment shall not constitute a deficiency pro tempo in the principal of said fund.

It is also adjudged that said trustee shall semi-annually pay out of and from the income received from the investments of the principal of said fund, the sum of one thousand dollars, and shall pay the same into the principal fund, and shall endorse said payment upon said certificate originally given under this judgment for the payment of said sum of twenty-five thousand dollars ($25,000), which payment, when so endorsed, shall constitute a repayment pro tanto of said sum, and said trustee shall continue to make said semi-annual repayments until said sum of twenty-five thousand dollars ($25,000), has been so repaid, and said Security Company shall be under no other obligation or liability to repay said sum of twenty-five thousand dollars ($25,000) or any part thereof.

It is also adjudged that said Security Company shall conform to all of the agreements contained in said trust contract of December 31, 1879, other than the one with reference to the investments of said trust funds, as to which this judgment shall control; and that the defendant, the Hartford Life Insurance Company, keep said Security Company correctly informed of the names and
285 addresses of the certificate-holders in the Men's Division of the Safety Fund Department, and of the number and amount of such certificates in accordance with the terms of the Safety Fund contract, and furnish said Security Company such other information as may be required in accordance with the terms of said contract.

It is also adjudged that no costs shall be taxed by or in favor of any party hereto.

CURTIS, *J.*

Duly certified.

DEF'T'S EX. 9.

New Haven County Superior Court, March 23, 1910.

CHARLES H. DRESSER, of the Town and County of Hartford and State of Connecticut; Wilbur H. Squire of the town of Meriden, County of New Haven, State of Connecticut; Hugh J. Wiley of the town of New Haven, County of New Haven, State of Connecticut; L. F. Perdue of the city of Terre Haute, State of Indiana; E. W. Amsden of the city of Ormond, State of Florida; R. H. Davison of the city of Ballston Spa, State of New York; H. McClary of the town of Southington, County of Hartford, State of Connecticut; R. N. Stanley of Highland Park, County of Hartford, State of Connecticut; A. J. Bostwick of the town of Sharon, County of Litchfield and State of Connecticut; Charles
286 Donnelly of the City of Covington, State of Kentucky; Joseph Bradford of the City of Norwich, County of New London, State of Connecticut; Walter H. Adams of the City of Worcester, State of Massachusetts; Henry A. Weber of the city of Detroit, State of Michigan; W. J. M. Gordon of the City of Cincinnati, State of Ohio; W. C. VanLoon of said Cincinnati, State of Ohio; C. A. Roebuck of the Town of Williamstown, State of Massachusetts; O. S. Chapman of the City of Minneapolis, State of Minnesota; J. M. Bugg of the Town of Chipley, State of Georgia; Charles Ammen of the City of New Orleans, State of Louisiana; Adolph Schmidt of the City of Brooklyn, State of New York; A. B. Smith of the Town of Morristown, State of Vermont; William Booth of the Town of Clinton, State of Illinois; W. O. Oldman of the City of Springfield, State of Missouri; C. H. Robinson of the City of St. Paul, State of Minnesota; Porter Farley of the City of Rochester, State of New York; Herbert Myrick of the City of Springfield, State of Massachusetts; A. B. Stockwell of the Town of Windsor Locks, County of Hartford, State of Connecticut; W. L. Dodds of the City of Buffalo, State of New York; O. W. Kerner of the Town of Kernersville, State of North Carolina,

v.

THE HARTFORD LIFE INSURANCE COMPANY OF THE TOWN OF HARTFORD, State of Connecticut; the Security Company of the Town of Hartford, State of Connecticut; George E. Keeney of Somersville, Tolland County; Lewis Sperry of East Windsor Hill, Hart-
287 ford county; Rienzi B. Parker of the town of Hartford, County of Hartford; Louis E. Gordon of Hartford, County of Hartford; James H. Knight of the town of Hartford; Raymond G. Keeney of the town of Hartford, county of Hartford; Andrew Gordon of the town of Hazardville, county of Hartford, and Everett J. Lake of the town and county of Hartford, all of the State of Connecticut.

Judgment.

This action — brought by the plaintiffs in their own behalf and for the benefit of other creditors and certificate-holders in a similar

situation as themselves against The Hartford Life Insurance Company, The Security Company, George E. Keeney, Lewis Sperry, Rienzi B. Parker, Charles H. Bacall, Arthur F. Eggleston, Louis E. Gordon, James H. Knight, Raymond G. Keeney and Andrew Gordon, by complaint dated October 19, 1906, alleging that, prior to 1880, there had been devised a plan or form of assessment life insurance known as the "Safety Fund" plan, and that under said plan persons insuring therein were to pay in addition to admission fees, medical examination fees and other expenses dues, payments of $10 on each $1,000 of insurance to make up a Safety Fund;
288 that said Safety Fund was to be deposited with the Security Company, defendant, as trustee, and as often as said fund reached an amount sufficient to purchase $1,000, par value, of United States bonds, said trustee was to make investments of said fund therein; and that when the purposes and objects of said Safety Fund in the hands of said trustee had been fulfilled in accordance with the terms of the plan as set forth, said Safety Fund was to belong absolutely to the certificate-holders, and that said Hartford Life Insurance Company was to have no interest therein except in its application for the benefit of its certificate-holders in accordance with the terms of the plan; that in the year 1880 the defendant, The Hartford Life Insurance Company, adopted said plan of insurance and announced to the public and to prospective certificate-holders through its officers, managers and agents that it would do business thereunder, and, for the purpose of inducing prospective certificate-holders to take out certificates, published and caused to be published, and issued various circulars and other writings and literature descriptive of said plan of insurance; that the plaintiffs relied upon the representations and statements contained in said circulars and literature in taking out their certificates; that said company in the year 1899 for fraudulent purposes wrongfully ceased issuing certificates under said plan or form of insurance, and after said date, and after said Safety Fund had reached the sum of one million dollars, said Insurance Company asserted the right
289 and intention to levy upon the certificate-holders for mortuary dues and assessments and for expense dues, without limit as to number or amount, and to levy and demand such dues and assessments after the outstanding insurance in said Safety Fund Department should be reduced to below one million dollars, and that said Safety Fund did not belong to the certificate-holders but belonged to said Insurance Company, and that said Insurance Company continues to make said claim; and alleging faudulent diversions of moneys by the defendant, The Hartford Life Insurance Company, and the individual defendants from the funds and property of the Assessment Department of said Insurance Company, and illegal, excessive and unnecessary collections, and fees and assessments from the certificate holders in said department, and mismanagement of the Safety Fund by the defendants by reason of which large losses had resulted to the Safety Fund in the hands of the trustee, as appears fully in said complaint, and claiming for relief, first, that the true amount of said Safety Fund be ascertained

and declared and adjudicated to be the property of the Safety Fund Certificate-holders, and that The Hartford Life Insurance Company has no property therein, and that it be declared and adjudicated that such is the true meaning of said certificates of insurance, or that said certificates be reformed so as to convey said meaning; and praying also for a receiver, an accounting, a forfeiture of the moneys and benefits received by the defendant, The Hart-
290 ford Life Insurance Company from its certificate-holders, an injunction against The Hartford Life Insurance Company from making its claims in respect to the Safety Fund, damages in the amount of One Million Dollars, and for such other and further relief as in equity might pertain, came to this Court on the first Tuesday of November, 1906, when all the parties appeared; thence by pleadings as on file to September 16, 1908, when the issues between the plaintiffs and the defendants, The Hartford Life Insurance Company and the individual defendants, were closed by the plaintiffs' reply to the answer of The Hartford Life Insurance Company filed on said date; thence said cause came by continuance and by pleadings as on file to January 21, 1909, when the defendant, The Hartford Life Insurance Company moved the Court for an order that the issue or issues formed by paragraph 21 of the answer of The Hartford Life Insurance Company to paragraph 29 of the plaintiff's complaint and paragraph 10 of the plaintiff's reply thereto be heard and determined before any other issue in said cause was tried; thence to January 28, 1909, when the Court after fully hearing the parties by counsel, granted said motion and ordered that the issue or issues made by paragraph 21 of the answer of the defendant, The Hartford Life Insurance Company to paragraph 29 of the plaintiffs' complaint and paragraph 10 of the plaintiffs' reply thereto be heard and determined before any other issue in said cause was tried; thence said cause was continued to May 27,
291 1909, when all the parties except the Security Company, defendant, appeared and proceeded to the trial of the last named issue.

The Court having heard the parties with their witnesses on the last named issue finds the same in favor of the plaintiffs.

Whereupon it is adjudged and decreed that whenever the amount of outstanding insurance in the assessment or Safety Fund Department of The Hartford Life Insurance Company shall be reduced by death, lapse or other causes, to the amount of One Million Dollars, the Safety Fund in the hands of the trustee is to be distributed among such of the plaintiffs named in the complaint herein as shall have survived said period, and such other certificate-holders in the Men's Division of the said department of said Insurance Company whose certificates are in force at that time, in the proportion that the face value of their respective certificates bears to the total amount of the outstanding insurance in said division of said Safety Fund Department; provided, however, that none of the contingencies or situations provided for in said contract Exhibit "B" for the distribution of said Safety Fund shall have arisen before that time, but such provisions in said Exhibit "B" shall remain in full

force and effect unimpaired by this decree. And as the time when, in the ordinary course of events, the amount of outstanding certificates will be reduced to One Million Dollars is so remote,
292 and that it will ever occur is so uncertain, no other relief under the general prayer should be granted at this time on this issue.

SHUMWAY, *J.*

Duly certified.

STATE OF CONNECTICUT:

New Haven County Superior Court.

I, Alfred N. Wheeler, clerk of the Superior Court within and for New Haven County, in the State of Connecticut, and keeper of the records and seal thereof, hereby certify that the above and foregoing is a true copy of the judgment file, dated March 23, 1910, which judgment was rendered by Shumway, Judge, in the case of Charles H. Dresser, et als v. The Hartford Life Insurance Company of Hartford, Connecticut, et als.

In testimony whereof I hereunto set my hand and affix the seal of said court, at New Haven, in said county, this fourteenth day of November, 1912.

(Signed) ALFRED N. WHEELER,
[SEAL *Clerk.*

STATE OF CONNECTICUT:
New Haven County, ss:

I, Gardiner Greene Presiding Judge of the Superior Court for the State of Connecticut, in said county, do hereby certify that Alfred N. Wheeler, whose name is above written and subscribed, is and was at the date thereof, clerk of said Superior Court
293 duly appointed, commissioned and sworn, and keeper of the records and seal thereof, and that the above certificate by him made, and his attestation of record thereof, is in due form of law.

In testimony whereof I have hereunto set my hand this fourteenth day of November, 1912.

(Signed) GARDINER GREENE,
Presiding Judge.

STATE OF CONNECTICUT,
New Haven County, ss:

I, Alfred N. Wheeler, clerk of the Superior Court of the State of Connecticut, within and for New Haven County, and keeper of the seal thereof, hereby certify that the Honorable Gardiner Greene whose name is written and subscribed, was on the fourteenth day of November, 1912, and now is Presiding Judge of said court, duly appointed, commissioned, sworn and qualified; and that I am well acquainted with his handwriting and official signature and know and hereby certify the same within written to be his.

In testimony whereof I hereunto set my hand, and affix the seal of said court at the city of New Haven, in said county and state, on this fourteenth day of November, 1912.

(Signed) ALFRED N. WHEELER, *Clerk.*

294 DEFENDANT'S EXHIBIT 10 (Ex. 29 of Deposition).

Call No. 127.

Total amount of an assessment of one Policy rate on each member of Safety Fund Department at Policy rate attained age	$79,258.48
Allowance for discontinuance or lapse 2.76%	2,187.53
Product of assessment at ratio of 1	$77,070.95
Death losses assessed for on Call No. 127	$323,919.95

$77,070.95 divided into $323,919.95 gives 4.202.
The ratio actually used was 4.20.

DEFENDANT'S EXHIBIT 11 (Ex. 30 of Deposition).

March 31st, 1910.

(Mortuary Balance $168,473.58.)

Death Losses incurred but theretofore unassessed for.		$540,000.00
Assessed for—Call No. 127	$323,919.95	
Death Claims unassessed for	216,080.05	
	$540,000.00	
Death Losses theretofore unassessed for March 31		$540,000.
Paid theretofore	$200,333.33	
Unpaid	339,666.67	
	$540,000.00	

295

Death Losses Assessed for Call No. 127		$323,919.95
Theretofore paid	$198,994.19	
Unpaid	124,925.76	
	$323,919.95	
April Death Losses	$99,000.	

April 30th, 1910.

(Mortuary balance $89,371.87.)

Death Losses incurred but theretofore unassessed for.		$639,000.00
Assessed for—Call No. 127.....	$323,919.95	
Incurred but unassessed for.....	315,080.05	
	$639,000.00	
Death Losses theretofore unassessed for.....		$639,000.00
Paid prior to April 30th.....	$303,333.33	
Unpaid on April 30th.....	335,666.67	
	$639,000.00	
Assessed for on Call No. 127.....		$323,919.95
Paid April 30th and prior.....	$282,419.95	
Unpaid	41,500.00	
	$323,919.95	

296 DEFENDANT'S EXHIBIT 12 (Ex. 38 of Deposition).

Calculation of Call No. 127.

Safety Fund Department, Men's Division.

In Force March 31, 1910.

Age.	Rate.	Amount.	Product.
33	.91	1,000	.91
34	.97	2,000	1.88
35	.97	5,000	4.85
36	1.00	5,000	5.00
37	1.03	25,000	25.75
38	1.06	26,500	28.09
39	1.09	46,000	50.14
40	1.12	64,000	71.68
41	1.14	65,000	74.10
42	1.16	96,500	111.94
43	1.18	134,500	158.71
44	1.20	133,500	160.20
45	1.22	162,000	197.64
46	1.25	229,000	286.25
47	1.30	307,000	399.10
48	1.35	346,000	467.10
49	1.40	451,500	632.10
50	1.47	465,000	683.55
51	1.54	526,000	810.04

52	1.63	713,000	1,162.19
53	1.72	726,000	1,248.72
54	1.81	663,500	1,200.94
55	1.92	773,000	1,484.16
56	2.03	876,500	1,779.30
57	2.15	859,500	1,847.93
58	2.32	894,000	2,074.08
297			
59	2.50	954,500	2,386.25
60	2.68	995,000	2,666.60
61	2.86	899,000	2,571.14
62	3.08	933,600	2,875.49
63	3.30	874,500	2,885.85
64	3.65	751,500	2,742.98
65	4.00	810,500	3,242.00
66	4.00	823,500	3,294.00
67	4.00	762,500	3,050.00
68	4.00	646,000	2,584.00
69	4.00	809,500	3,238.00
70	4.00	659,600	2,638.40
71	4.00	533,500	2,134.00
72	4.00	563,500	2,254.00
73	4.00	446,500	1,786.00
74	4.00	538,500	2,154.00
75	4.00	439,500	1,758.00
76	4.00	421,500	1,686.00
77	4.00	348,500	1,394.00
78	4.00	360,000	1,440.00
79	4.00	234,500	938.00
80	4.00	300,000	1,200.00
81	4.00	186,000	744.00
82	4.00	141,500	566.00
83	4.00	114,000	456.00
84	4.00	83,000	332.00
85	4.00	47,000	188.00
86	4.00	51,000	204.00
87	4.00	18,000	72.00
88	4.00	12,000	48.00
89	4.00	9,000	36.00
298			
90	4.00	2,000	8.00
91	4.00	3,000	12.00
		23,368,200	68,551.06

Calculation of Call No. 127.

Safety Fund Department, Men's Division.

In Force March 31, 1910.

Form 3.

Age.	Rate.	Amount.	Product.
34	.91	3,000	2.73
35	.93	2,000	1.86
36	.95	1,000	.95
37	.97	2,000	1.94
38	.99	3,000	2.97
39	1.01	5,000	5.05
40	1.04	7,000	7.28
41	1.06	2,000	2.12
42	1.09	8,000	8.72
43	1.13	17,000	19.21
44	1.17	6,000	7.02
45	1.22	6,000	7.32
46	1.28	7,000	8.96
47	1.35	8,000	10.80
48	1.43	8,000	11.44
49	1.51	11,000	16.61
50	1.59	17,000	27.03
51	1.69	12,000	20.28
52	1.79	14,500	25.96
53	1.91	13,000	24.83
54	2.03	20,000	40.60
299			
55	2.17	6,000	13.02
56	2.31	12,000	27.72
57	2.47	11,500	28.41
58	2.64	16,500	43.56
59	3.03	13,000	39.39
60	3.47	25,000	86.75
61	3.94	8,000	31.52
62	4.43	6,000	26.58
63	4.96	24,500	121.52
64	5.56	10,000	55.60
65	6.24	15,500	96.72
66	6.24	10,000	62.40
67	6.24	5,000	31.20
68	6.24	6,000	37.44
69	6.24	9,000	56.16
70	6.24	6,000	37.44
71	6.24	4,000	24.96
72	6.24	2,000	12.48
73	6.24	5,000	31.20
74	6.24	....	.....

75	6.24	3,000	18.72
76	6.24	....	.....
77	6.24	....	.....
78	6.24	....	.....
79	6.24	....	.....
80	6.24	....	.....
		370,500	1,136.47

300 *Calculation of Call No.* 127.

Safety Fund Department, Men's Division.

In Force March 31, 1910.

Form 4.

Age.	Rate.	Amount.	Product.
32	.87	1,000	.87
33	.89	7,500	6.68
34	.91	11,500	10.47
35	.93	15,000	13.95
36	.95	23,000	21.85
37	.97	17,000	16.49
38	.99	28,500	28.22
39	1.01	50,000	50.50
40	1.04	45,500	47.32
41	1.06	61,000	64.66
42	1.09	59,500	64.86
43	1.13	97,000	109.61
44	1.17	87,500	102.38
45	1.22	107,000	130.54
46	1.28	102,500	131.20
47	1.35	122,000	164.70
48	1.43	117,000	167.31
49	1.51	126,000	190.26
50	1.59	134,500	213.86
51	1.69	154,500	261.11
52	1.79	176,500	315.94
53	1.91	210,000	401.10
54	2.03	164,000	332.92
55	2.17	233,750	507.24
56	2.31	124,500	287.60
57	2.47	108,000	266.76
58	2.64	157,000	414.48
301			
59	3.03	147,500	446.93
60	3.47	133,500	463.25
61	3.94	122,500	482.65
62	4.43	109,500	485.09
63	4.96	102,500	508.40

64	5.56	55,500	308.58
65	6.24	102,500	639.60
66	6.24	67,000	418.08
67	6.24	58,000	361.92
68	6.24	47,750	297.96
69	6.24	29,000	180.96
70	6.24	35,500	221.52
71	6.24	21,000	131.04
72	6.24	21,500	134.16
73	6.24	13,500	84.24
74	6.24	6,000	37.44
75	6.24	....	.....
76	6.24	2,000	12.48
		3,616,000	9,537.18

Calculation of Call No. 127.

Safety Fund Department, Men's Division.

In Force March 31, 1910.

Form 3½.

Age.	Amount.	Rate.	Product.
33	.89	1,000.00	.89
34	.91	.....	...
35	.93	2,000.00	1.86
36	.95	3,000.00	2.85
37	.97	3,000.00	2.91
38	.99	1,000.00	.99
39	1.01	1,000.00	1.01
302			
40	1.04	1,000.00	1.04
41	1.06	.....	....
42	1.09	1,000.00	1.09
43	1.13	1,000.00	1.13
44	1.17	.....	....
45	1.22	2,000.00	2.44
46	1.28	.....	....
47	1.35	2,000.00	2.70
48	1.43	3,000.00	4.29
49	1.51	.....	....
50	1.59	1,000.00	1.59
51	1.69	1,000.00	1.69
52	1.79	.....	....
53	1.91	2,000.00	3.82
54	2.03	.....	....
55	2.17	.....	....
56	2.31	.....	....
57	2.47	.....	....
58	2.64	.....	....
59	3.03	.....	....
60	3.47	1,000.00	3.47
		26,000.00	33.77

Original Assessment Policies.	Product.
Form No. 3	$68,551.06
Form No. 4	1,136.47
Form No. 3½	9,537.18
Total	33.77
	$79,258.48
Allowance for lapse 2.76%	2,187.53
Product for ratio of 1. (one)	77,070.95
Death losses assessed for	323,919.95
Ratio for Call No. 127	4.20

303 DEFENDANT'S EXHIBIT 13 (Ex. 46 of Deposition).

Death Losses Incurred, Men's Division, During the Year 1910.

January	$120,000
February	138,000
March	140,000
April	99,000
May	121,000
June	95,000
July	93,500
August	86,000
September	103,000
October	138,500
November	112,000
December	99,500

DEFENDANT'S EXHIBIT 14 (Ex. 51 of Deposition).

Year.	Received from mortality calls.	Paid for death losses.
1880	$21,551.02	$17,965.00
1881	118,263.17	111,603.00
1882	158,710.19	147,440.00
1883	210,823.83	199,165.00
1884	217,047.36	207,427.00
1885	386,204.91	434,415.00
1886	515,029.50	516,940.00
1887	573,775.08	531,589.00
1888	626,517.40	625,466.00
1889	676,937.06	702,368.94
304		
1890	800,199.27	779,085.55
1891	906,179.19	905,122.00
1892	1,065,525.94	1,023,608.28

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1893	996,065.14	1,059,775.00
1894	1,031,351.22	1,039,561.00
1895	1,132,808.93	1,141,153.76
1896	1,125,972.73	1,108,487.37
1897	1,121,550.87	1,241,921.17
1898	1,289,080.22	1,130,084.20
1899	1,279,544.53	1,201,784.49
1900	1,297,629.67	1,347,949.07
1901	1,402,750.62	1,403,343.01
1902	1,371,681.50	1,333,691.73
1903	1,177,544.63	1,167,953.16
1904	1,341,198.26	1,269,899.72
1905	1,341,165.22	1,444,994.11
1906	1,277,385.39	1,217,377.79
1907	1,170,510.06	1,110,045.50
1908	1,183,143.62	1,296,621.37
1909	1,257,737.17	1,282,107.56
1910—March 31	327,794.59	234,259.93
Mortuary balance March 31, 1910	.....	168,473.58
	$27,401,678.59	$27,401,678.59

DEFENDANT'S EXHIBIT 15.

Application of Herman Ibs, omitted in printing except for the following portion:

"If I or my representatives shall omit or neglect to make any payment as required, in respect of amount place and time of payment, by the condition of such certificate, then the certificate to be issued hereon shall be null and void and all money paid thereon shall be forfeited to said company."

305 DEF'T'S EX. 16.

Special Notice.

The management of this Company have been seeking for sometime a satisfactory means of avoiding the accidental lapse of policies and the consequent trouble and annoyance. After careful deliberation, we have determined to adopt the second registered notice, substantially the same as that required by the law of Massachusetts.

Hereafter therefor, if the payment of a premium is not received at this office on or before the last day allowed for such payment, under the original notice, a second notice will be mailed to the policyholder by registered letter, giving fifteen days from the last day allowed for payment in the original notice, to remit, and the same charge will be made for this second notice as is made by the law of Massachusetts, namely, fifty cents.

Every member whose payment does not reach this office on or be-

ND CLOSE IN CENTER

fore the last day allowed for payment in the original notice, will be obliged to pay this fifty cent fee in order to have the policy unconditionally reinstated.

After fifteen days allowed for payment under the registered notice have expired, the Company reserves the right to require a medical examination as a condition of reinstatement.

CHAS. H. BACALL, *Secretary.*

306 (Endorsed:) Hartford, Conn., May 2, 1898. F 1339, 15 M. Exhibit No. 33. Deposition of Thomas F. Lawrence, Ibs vs. The Hartford Life Ins. Co. W. B. J., N. P.

DEFENDANT'S EXHIBIT 17 (Ex. 34 of Deposition).

Hartford Life Insurance Co., Hartford, Conn.

DEAR SIR: In April, 1898, this Company adopted a new rule by which a second notice is sent by registered mail to all persons whose remittance does not reach this office on the last day of grace.

The purpose of this was to save the annoyance and vexation, as well as the expense, which is experienced by every person who has allowed his policy to lapse accidentally, and who may be subjected to the expense and trouble of examination before his policy can be reinstated.

Notice of this rule was sent you with your regular notice, and the statement was made that if the money was not received at this office in payment of your premium on the last day of grace, a charge of fifty cents would be made as a condition of reinstatement.

Your present remittance falls under this rule having been
307 received after the last day of grace allowed for payment. We have charged your account with the fifty cent fee.

Yours truly,

T. F. LAWRENCE, *Secretary.*

DEF'T'S EX. 23.

Mr. DURMENT: Now, we offer in evidence Ex. 23 to the deposition, which is the registry receipt for this letter, the letter itself, and the envelope in which it was contained, and I will read the letter; that is, if it is admissible,—I think it is:

"July 29, 1910.

Mr. Herman Ibs, 105 Central Avenue, St. Paul, Minn.

DEAR SIR: Having received no reply to our letter of July 1st, we return herewith the money order for $33.95 which you forwarded to the company to cover the call of June 1st on certificate 70,627 on your life. This settlement was made after the certificate had lapsed, and consequently could not be accepted * * * The certificate has no value whatever. As we previously advised you, however, the certificate may be placed in full force and effect provid-

ing you make settlement of the overdue call * * * If you wish to have the insurance placed in force, forward us a money order for $36.95—$35.95 to cover the call referred to above and * * * and $1 to cover the necessary medical examination. We will then forward * * * with full instructions for having it ex-
308 ecuted.

Yours very truly,

T. F. LAWRENCE, *Secretary.*"

And this simply is the envelope showing it was never delivered and came back.

Having examined the foregoing and found it to conform to the truth and to state all the proceedings had upon the trial of the action, it is hereby allowed and signed as and for a Settled Case therein.

Dated January 23rd, 1912.

FREDERICK N. DICKSON,
District Judge.

Endorsed: Filed Jan. 23, 1913. Matt. Jensen, Clerk, by G. P. Ritt, Deputy.

309 STATE OF MINNESOTA,
Supreme Court, ss:

Mandate.

The State of Minnesota to the Hon. Judge and officers of the District Court of the Second Judicial District sitting within and for the County of Ramsey, Greeting:

Whereas, Lately in your Court, in an action therein pending, between Eliza Ibs, Plaintiff and Hartford Life Insurance Company, Defendant a certain order was entered therein December 9, 1912, from which action of your Court an appeal thereafter was taken to this Court;

And whereas, The same was duly argued, heard and submitted; and after mature deliberation thereupon had, our Supreme Court did adjudge, determine, decree and order "That the order of the Court below herein appealed from, be, and the same hereby is, in all things affirmed and cause remanded to the Court below with directions to enter judgment for Plaintiff upon the verdict and that judgment be enterd accordingly." A copy of the entry of Judgmen thereupon in this Court is herewith transmitted and made part of the Remittitur.

Now, therefore, This Mandate is to you directed and certified, to inform you of these proceedings had in our Supreme Court, in said hereinbefore mentioned cause, and the same is hereby and herewith remanded to your Court for such other or further record and proceedings therein as may be by law necessary, just and proper, under and by virtue of the said order herein made.

Witness, The Hon. Calvin L. Brown, Chief Justice of the Supreme

Court aforesaid, and the seal of said Court at St. Paul, this 13th day of May 1913.

[SEAL.]

I. A. CASWELL,
Clerk of the Supreme Court.

310 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

No. 105,894.

ELIZA IBS, Plaintiff,
against
HARTFORD LIFE INSURANCE COMPANY, Defendant.

Pursuant to the verdict of the Jury duly rendered and filed in the above entitled action on the 25th day of November A. D. 1912, and the Mandate of the Supreme Court filed in this office on the 17th day of January 1913.

Now, on motion of O. E. Holman, Esq., said Attorney, it is hereby adjudged that the plaintiff herein recover of said Defendant Hartford Life Insurance Company the sum of two thousand three hundred thirty-three and 32/100 dollars damages, with forty seven and 40/100 dollars costs and disbursements, in all amounting to $2,380.72.

Signed this 17th day of May A. D. 1913.

MATT JENSEN, *Clerk,*
By G. A. JOHNSON,
Deputy Clerk.

311 [Endorsed:] No. 105894. District Court. Ramsey County. Eliza Ibs, Plaintiff against Hartford Life Ins. Co., Defendant. Judgment Roll. Filed 17th day of May A. D. 1913. Matt. Jensen, Clerk. By G. A. Johnson, Deputy Clerk. O. E. Holman, Plaintiff's Attorney.

312 18088.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1913.

No. 166.

ELIZA IBS, Respondent,
v.
HARTFORD LIFE INSURANCE COMPANY, Appellant.

Syllabus.

Action to recover on a benefit certificate or policy of life insurance upon the assessment plan, the defense being that the insured had

failed to pay an assessment and an installment of dues, and that the policy had therefore been forfeited.

1. Evidence considered and held to show conclusively that there was no necessity to levy an assessment to pay any part of the death claims to pay which the assessment in question was levied, the mortuary fund on hand available for the payment of death claims being more than sufficient in amount to pay all such claims.

2. The policy does not authorize the levy of an assessment to pay losses that may be anticipated to occur in the future, and in the absence of such authorization, an assessment that is unnecessary to pay accrued losses, but which is really levied to create a fund out of which to pay future losses, is illegal and the failure to pay such assessment is not ground for a forfeiture of the policy.

3. Though keeping a balance in the mortuary fund for convenience in the prompt payment of losses may be warranted by the contract, yet when such balance is sufficient in amount to pay all losses that have accrued, an assessment to pay such losses is
313 illegal to the extent that a forfeiture cannot be predicated upon the non-payment of such assessment.

4. The assessment in question, though nominally levied to pay specified death claims that had accrued, was in reality levied to create or replenish a fund out of which to pay future losses.

5. It having been the long continued and uniform custom of defendant to give the insured notice of each demand for expense dues, thus giving the insured the right to believe that such notice would be continued to be given, defendant cannot forfeit the policy for a failure to pay dues as to which no notice has been given.

6. The notice given in this case, demanding payment of a single amount, which included the illegal assessment and the quarterly dues, and notifying the insured that unless such amount was paid by a day stated, his policy would be forfeited, made it clear that a tender of the dues alone would have been a vain and idle ceremony, and that the law does not require a tender under such circumstances. Such notice was not a sufficient notice as to the dues.

7. It was not error to exclude from evidence certain decrees of a Connecticut Court, neither the issues or the parties being the same as in the case at bar. Nor did the Court, in excluding such decrees, violate either the full faith and credit clause of the United States Constitution, or the provisions of such constitution forbidding any state to pass any law impairing the obligation of contracts.

Order affirmed.

314 18088.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1913.

No. 166.

ELIZA IBS, Respondent,
vs.
HARTFORD LIFE INSURANCE CO., Appellant.

Opinion.

This is an action to recover upon a certificate of membership, or policy of life insurance upon the assessment plan, issued by defendant to Herman Ibs, in which policy plaintiff was designated as the beneficiary. At the close of the evidence the trial court directed a verdict in favor of plaintiff for the full amount of the policy with interest. Defendant appeals from an order denying its motion for judgment notwithstanding the verdict or for a new trial.

The case was before us at the April 1912 term on an appeal by plaintiff from an order denying a new trial after a dismissal. Without determining the questions argued on that appeal, we held that there ought to be a new trial to "clarify the claims of the respective parties, and enable the court to determine the case upon the merits as then presented". Ibs vs. Insurance Co., 119 Minn. 113. The case is before us now after such a determination on the merits by the trial court. It is not claimed that there was any question in the case for the jury to pass upon, and clearly either plaintiff or defendant was entitled to a directed verdict.

As stated in our opinion on the former appeal, the defense to the action was the failure of the insured to pay the dues and a
315 certain assessment, which were due and payable June 20th, 1910. Plaintiff admitted this failure to pay these dues and this assessment, but claimed that the assessment was unlawful under the terms of the contract, and that the failure to pay the dues did not forfeit the policy because the "call" for the same was coupled with the demand for the illegal assessment, and also because defendant had in its possession at the time of the alleged default money derived from accumulated interest on its safety fund, which the contract provided should be distributed among the policy holders in reduction of their dues.

This question of the duty of the defendant to apply the insured's proportion of the safety fund in payment of his dues in order to save a forfeiture is not presented on this appeal. The main questions now before us for decision are: (1) was the non-payment of the assessment ground for forfeiture of the policy? (2) if it was not was the failure of the insured to pay the dues payable June 20th, a sufficient ground?

To determine the legality of the assessment in question, we must look to the language of the contract, and to the facts relating to the purpose for which the assessment was levied.

By the terms of the certificate or policy, issued by defendant to Ibs April 4th, 1885, he agreed to pay and was required to pay assessments proportioned to the maximum indemnity provided for by the policy, which assessments, in the language of the policy, are to be "levied against the herein named member to form a mortuary fund for the payment of all indemnity matured by deaths of members, which assessments, to be levied upon all members in the department wherein this certificate is issued,
316 whose certificates are in force at the dates of such deaths, shall be made according to the table of graduated assessment ratios given herein, and as further determined by their respective ages and the aggregate maximum indemnity at the dates of such deaths, with due allowance for discontinuance of membership".

It is further provided in the policy that the member "also agrees to pay said company, upon all certificates that shall mature by death, within thirty days from day on which notices bear date, all assessments determined as within set forth; the proceeds of which, after deducting ten cents on each assessment for cost of collection, shall form said mortuary fund".

The facts relating to the levy of the assessment for the nonpayment of which the policy was declared forfeited, are as follows:

The call for the assessment was sent to the insured May 2nd, 1910. The notice states that the assessment "is made to meet 145 deaths (as shown by accompanying list), benefits $323,919.95". The list accompanying the notice contained the names of 145 deceased members, the claims of whose beneficiaries were included in the call and aggregated the exact amount of the assessment, together with the dates of their deaths, beginning September 28, 1909, and ending February 13th, 1910.

The assessment was based upon conditions and data existing as of the date March 31, 1910, and its preparation was begun April 1st. On March 31st, the mortuary fund, made up from the accumulations of prior assessments, amounted to the sum of $168,473.58. Of the death losses to pay which the assessment was levied, and stated in the call, aggregating $323,919.95, there had been
317 paid prior to March 31st $198,994.19, leaving $124,925.76 unpaid, a sum less by $43,547.82 than the balance then in the mortuary fund. It is plain, therefore, that all of the death losses to pay which the assessment in question was levied, could have been paid out of this mortuary fund, without levying the assessment, and a balance of over $43,000 left in the fund. We think it clear that the necessity for this assessment and its validity must be determined by the condition of the so-called mortuary fund on March 31st, and the amount of the death losses to pay which the assessment was levied according to the notice sent to members. There were some death losses at that date which, though not used as a basis for arriving at the amount of the assessment, and not mentioned in the call, had been reported to defendant, and part

of them approved. We hold that these should not be considered. The assessment was not levied to pay such losses, but only the losses stated in the list accompanying the notice. Death losses not included in this list were included in subsequent assessments.

1. We have then this situation. There was no necessity to levy an assessment to pay any part of the losses included in the list attached to the notice. They could all have been paid out of the balance in the mortuary fund, and a balance left in that fund. Was it legal for defendant to forfeit a contract of a member for the non-payment of an assessment made nominally to pay specified death losses that had already occurred, but in reality to create or replenish a fund out of which future death losses could be paid?

318 2. We have hereinbefore stated the provisions of the contract that relate to the purposes for which assessment may be levied, and have italicized the language which is pertinent on the question before us. It is true that it is provided that assessments shall be levied "to form a mortuary fund," but it is stated that this fund is for the payment of "all indemnity matured by deaths of members," and that the assessment is to be levied upon all members "whose certificates are in force at the dates of such deaths," and made according to a table of graduated assessment ratios, and "further determined by their respective ages and the aggregate maximum indemnity at the dates of such deaths." And the agreement of the member is to pay "upon all certificates that shall mature by death, all assessments determined as within set forth." And it is again provided that the proceeds of such assessments, after deducting the cost of collection, shall "form said mortuary fund."

We see nothing in the language quoted or in any other provisions of the contract that expressly or by necessary implication authorizes the insurer to accumulate a "mortuary fund" out of which to pay death losses that occur in the future. The whole sense of the contract is that an assessment may be levied to pay losses already sustained. Calling the fund obtained by an assessment a "mortuary fund" does not warrant the accumulation of such a fund for the payment of future death claims. This conclusion is strengthened by the long continued and universal custom of the company to state in the notice of each assessment the names of the deceased members to pay the claims of whose beneficiaries the assessment is made, with the dates of their deaths and the amounts of the claims, and by the fact that each assessment is in amount identical with

319 the aggregate amount of the death losses so stated. The necessary effect of a contrary holding would be to authorize the accumulation by assessments of an immense "mortuary fund," when such a fund was wholly unnecessary to pay present claims; this to the great burden of assessed members, and to the advantage of no one. Members would often be obliged to pay for losses that accrued after their own deaths, or after they ceased to be members, contrary to the declarations in the contract that members shall be assessed for the payment of "indemnity matured by deaths

of members," and upon "certificates that are in force at the dates of such deaths," and that they agree to pay assessments upon "all certificates that shall mature by death."

It is settled law that as assessment to pay future losses is illegal unless the power is conferred by the contract, and we hold that the contract between the insured and defendant cannot be fairly construed as conferring that power. As it is clear that the assessment in question here was not necessary to pay accrued losses but was in reality levied to pay losses that might be anticipated to occur in the future, it follows that it was unauthorized and could not be made the basis of a forfeiture. The case of Schultz v. Citizens Mutual Life Insurance Co., 58 Minn., 308, is decisive on the proposition that an assesment to pay future losses is void if the contract does not authorize an assessment for such purpose, and our decision that the contract does not authorize such an assessment is sustained by King v. Hartford Life Ins. Co. 133 Mo. App. 612, 114, S. W. 63; and Johnson v. Hartford Life Ins. Co. — Mo. App. —;
320 148 S. W. 631. These cases involve the same form of contracts as the case at bar, and are directly in point. Other authorities on the proposition that an assessment in anticipation of losses is illegal unless authorized by the contract are People's Equitable Mutual Life Ins. Co. v. Babbitt, 89 Mass. 236; Rosenberger v. Washington Fire Ins. Co., 87 Pa. St. 207; Hogan v. Pac. End. League, 99 Cal. 248. See also Bacon on Life Insurance, 3rd Ed. Sec. 377; Viblack on Benefit Societies, Sec. 254.

3. Great stress is laid on the practical necessity of keeping a balance in the mortuary fund. It probably is true that it is convenient and altogether desirable to have money on hand out of which to pay promptly losses that have accrued. And we do not hold that this course is not warranted by the provisions of the contract. What we do hold is that when this balance on hand is sufficient in amount to pay all losses that have accrued, an assessment to pay such losses is unnecessary and illegal, at least to the extent that a forfeiture cannot be predicted upon the non-payment of such an assessment.

4. It is disputed that the assessment in question was levied to pay anticipated losses in the future. It is true that it was levied to pay specified past death claims, if the purpose was as stated in the notices sent to members. But it is conclusive that it was not necessary to levy any assessment in order to pay the death claims named in the notice, that such death claims were already paid in part out of the mortuary fund, and that all could be so paid and a substantial balance left in that fund. It seems to follow necessa-
321 rily that the amount realized from the assessment in question would be used to pay future death claims. It does not help to say that the proceeds would go to replenish the mortuary fund, or to say that it was necessary and lawful to keep a balance in this fund. Equity, in its abhorrence of a forfeiture, will say that when that fund reaches a sum sufficient to pay all accrued death claims, the beneficiary of a deceased member who has paid his dues and assessments for twenty-five years, may well claim that a for-

feiture can not be based upon the failure of such member to pay an unnecessary assessment.

5. Having reached the conclusion that the assessment was unnecessary and illegal as to Ibs, it remains to be considered whether his failure to pay the expense dues avoided his contract and justified defendant in forfeiting it. It is conceded that the accumulated interest from the "safety fund" which the contract provided should be divided between the members in reduction of dues and assessments had been so applied, and that defendant did not have these funds in its possession at the time of the alleged default. We are unable therefore to apply the rule as to the duty of defendant to use funds in its possession belonging to the insured in order to prevent a forfeiture. We doubt also whether defendant could legally have applied the balance in the "mortuary fund" to the payment of dues of members, as we do not hold that the members were entitled to a distribution of this fund.

This brings us to a different and perhaps doubtful question, said in the opinion on the former appeal to be an important one.
322 This question was there stated to be "whether the insured was justified in failing or refusing to pay the dues because the notice was coupled with an illegal demand for the assessment."

In the solution of this problem it is not important that there is no evidence that the insured actually based his refusal to pay dues upon this ground. Defendant is seeking a forfeiture, and if there can be found a valid excuse or justification for the neglect, the beneficiary ought to be permitted to take advantage of such excuse or justification, even though the failure of the insured was actually due to mere neglect, or as quite probable, to illness. In the former opinion it was said that the solution of this question "might to some extent depend upon the question whether defendant was under obligation to give the notice, and whether the insured would have been justified in failing to pay until he received the same." What was not clear when the case was here before is clear now, that is that it was the long continued and uniform custom of the company to give the insured notice of each demand for dues. While the policy did not expressly require such notice, it did not expressly say that notice was unnecessary. It did provide that a printed or written notice addressed to the member should be sufficient for all purposes and reasons may be suggested for the adoption of the uniform custom to give notice. The exact dates for the payment of dues *was* not definitely fixed by the contract, though we do not say that a member might not figure out the dates when his "monthly or other pro rata installments for periods of less than a year"
323 were payable. While the amount of the dues was fixed at $6.00 per year, or $1.50 per quarter, it appears that the insured might at any time be entitled to a reduction of this amount from his share of the interest from the safety fund. There is abundant ground, both on principle and on authority for holding, as we do, that having given the insured the right to believe that notice of the amount and time for payment of his dues would be given him, the company cannot forfeit the policy for a failure to

pay dues as to which no notice has been given. Hartford Life Ins. Co. v. Hyde, — Tenn. —, 48 S. W. 968; Mayer v. Mutual Life Ins. Co., 38 Iowa 309; Union Central Life Ins. Co. v. Pattker, 33 Ohio St. 459; Helme v. Philadelphia Life Ins. Co. 61 Pa. St. 107 Grant v. Alabama Life Ins. Co. 76 Ga. 583; Contra, Thompson v. Ins. Co. 104 U. S. 252.

6. Was the notice given the insured in this case sufficient? It was as follows:

"Special notice of Quarterly Call No. 127.

"Herman Ibs, 105 Central Ave., St. Paul:

"This call, which will be due June 1st, 1910, is made to meet 145 deaths (as shown by accompanying list), benefits $323,919.95, and expenses on your policy as follows:

For mortuary call	$33.95
For Quarterly dues to Sept. next	1.50
Amount due	$35.45

"Payment will not be accepted later than June 5th, 1910. * * *

"Unless the payment called for by this notice shall be paid
324 to the company at its home office by or before the day it falls due, the policy and all payments thereon will become forfeited and void."

It is perfectly clear that this is a demand for $35.45, the assessment and dues, as one payment. The notice that unless "the payment called for by this notice shall be paid" on or before the day it falls due, leaves no room to doubt that a tender of the $1.50 for dues would have been refused. Was the insured obliged to make this tender? True, the demand specified the amount of the dues, but it seems quite apparent that the assessment was the main thing, and that the tender of the dues would have been a useless act.

It is a rule of the law of tender that when the creditor demands an amount larger than he is entitled to, and refuses to receive anything less, a tender of the correct amount is waived. In other words, when it is clear that a tender would have been refused, the law does not require the doing of the vain and useless act of making such tender. 28 Am. & Eng. Ency. of Law, p. 7. A tender is waived where the tenderee takes any position which would render a tender, so long as the position taken by him is maintained, a vain and idle ceremony. 38 Cyc. 135, Gill v. Newell, 13 Minn. 462. The company in the case at bar clearly took the position that unless payment of the entire sum, assessment and dues, was made, the policy would be forfeited. It is still maintaining that position. It not only demanded more than it was entitled to receive, but expressly told the insured that unless the entire sum demanded was paid, a forfeiture would result.

We feel fully justified in holding that a tender of the
325 dollar and a half would have been a "vain and idle ceremony", a useless act. This conclusion is amply sustained

by the authorities on the subject of tender. In addition to those already cited, we refer to the following: Weinberg v. Naher, 51 Wash. 591, 22 L. R. A. n. s. 956; Bowden v. Dugan, 91 Me. 142; Hamilton v. McLaughlin, 145 Mass. 20. The case of King v. Hartford Ins. Co. 133 Mo. App. 619, sustains the position of plaintiff on this point, though the opinion does not state that there was a fixed amount payable as dues. The cases relied on by defendant are clearly distinguishable. Our conclusion on this branch of the case is that Ibs was not obliged to do the useless act of making tender of the amount of his dues, and that the notice given him, coupled as it was with a demand for the payment of an illegal assessment, was not a sufficient notice as to dues.

It is claimed that it was prejudicial error to exclude from evidence the decrees in the case of Dresser et al. v. This defendant et al. in the superior court of New Haven County, Connecticut. It is also claimed that in excluding these decrees, the trial court violated Sec. 1, Article IV, of the constitution of the United States, providing that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," and also Sec. 10, Article 1 of such constitution, forbidding any state to pass any law "impairing the obligation of contracts." The Dresser case was brought by the plaintiff on behalf of himself and other policy holders of defendant against the company and its officers, and the custodian of the "safety fund." The main
326 issue in the case was in regard to the safety fund and its management, but it was also claimed by plaintiffs that the defendants, the company and its officers, were levying assessments unnecessary in amount and number for their own wrongful purposes. It was adjudged that this was not true. It was claimed that it was improper and wrongful for defendant to accumulate the margins arising from the difference between the amount of losses paid and the amount of losses assessed for, and to carry this balance in the mortuary fund, and claimed that this balance of margins should be distributed among the outstanding certificate holders, but it was held that it was proper and reasonable that the company should hold some such fund to enable it to pay losses promptly, that the mortuary fund thus formed belongs to the certificate holders, and that the company is reasonably entitled to hold the same as a necessary and proper fund for the payment of death claims.

We are not able to see how these decrees have any material bearing on the issues in the case at bar, much less how they are controlling. The issues here are vitally different from those in the Dresser litigation. There was no question there of a forfeiture, nor of the legality of an assessment levied to pay specified death losses, when the balance in the mortuary fund was ample to pay all such losses. The right to hold a balance in the mortuary fund was affirmed, but not the right to forfeit a policy for non-payment of an unncessary assessment. Neither the issues or the parties were the same as in the case at bar. The decrees are not even authority against plaintiff's contentions here; much less are they binding on

the principle of res adjudicata, or estoppel by judgment.
327 This question is discussed and we think correctly disposed of in Johnson vs. This Defendant, 166 Mo. App. 261. We hold that it was not error to exclude from evidence the decrees in the Dresser case, and that neither constitutional provision referred to was violated.

Order affirmed.

BUNN, *J.*

Per Curiam.

It is ordered that the foregoing order of affirmance be amended by adding thereto, "and cause remanded to the court below with directions to enter judgment for plaintiff upon the verdict."

Dated May 10, 1913.

328 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the opinion in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 24th day of May, A. D. 1913.

[Seal Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk.*

329 [Endorsed:] No. 18088. State of Minnesota, Supreme Court, Eliza Ibs, Respondent, vs. Hartford Life Ins. Co., Appellant. Opinion and Syllabus. Filed May 2, 1913, I. A. Caswell, Clerk, April Term, A. D. 1913, Bunn, J.

330 In the Supreme Court of the United States.

THE HARTFORD LIFE INSURANCE COMPANY, HARTFORD, CONNECTICUT, Plaintiff in Error,
vs.
ELIZA IBS, Defendant in Error.

Petition for Allowance of Writ of Error.

To the Honorable the Chief Justice of the Supreme Court of the United States:

Now comes your petitioner, The Hartford Life Insurance Company, Hartford, Connecticut, by its attorneys, James C. Jones, Edmund S. Durment, Geo. F. Haid & James C. Jones Jr. and respectfully shows that on the 17th day of May, A. D. 1913, the

District Court of Ramsey County in the tSate of Minnesota, under the specific order and mandate of the Supreme Court of the State of Minnesota, being the highest court of the State of Minnesota in which a decision of the suit could be had, rendered a judgment against your petitioner in a certain cause wherein Eliza Ibs was plaintiff and your petitioner was defendant, for the sum of $2,380.72, and the costs of suit, and awarded execution thereon, as will appear by reference to the record and proceedings in said cause; the said court being the highest court in the State of Minnesota in which a judgment in said suit could be had.

Your petitioner respectfully claims the right to remove said record and said judgment to this court by writ of error, under the statutes of the United States authorizing writs of error to state courts, and particularly under section 709 of the Revised Statutes of the United States, because in the record and proceedings had in said cause and in the rendition of said judgment manifest error hath happened to the great injury and damage of your petitioner, in that:

1. The said District Court of Ramsey County, Minnesota,
331 failed and refused at the trial of said cause to admit in evidence a decree of the Superior Court of New Haven County, Connecticut, in the case of Dresser and others, vs. The Hartford Life Insurance Company, (Curtis, J.) duly exemplified under and in accordance with the acts of Congress, in which case of Dresser, et al. v. The Hartford Life Insurance Company there was involved and decided a controlling fact, material to the determination of said case of Eliza Ibs. vs. your petitioner, and to which action said Eliza Ibs was a party and privy in law and by which judgment and decree, she, the said Eliza Ibs was bound; which said ruling of the said trial court in so excluding said decree in said case of Dresser et al. vs. Hartford Life Insurance Company was affirmed by the Supreme Court of the State of Minnesota, thereby failing to give full faith and credit to such decree as is required by Article IV., Section 1. of the Constitution of the United States, and which action also violated Article I., Section 10 of the Constitution of the United States forbidding the making of any law impairing the obligation of contracts.

2. The said District Court of Ramsey County, Minnesota, failed and refused at the trial of said cause to admit in evidence a decree of the Superior Court of New Haven County, Connecticut, in the case of Dresser and others, vs. The Hartford Life Insurance Company (Shumway, J.) duly exemplified under and in accordance with the acts of Congress, in which case Dresser, et al. vs. Hartford Life Insurance Company there was involved and decided a controlling fact, material to the determination of said cause of Eliza Ibs vs. your petitioner, and to which action said Eliza Ibs was party and privy in law and by which judgment and decree, she, the said Eliza Ibs, was bound; which said ruling of the trial court in so excluding said judgment and decree in said case of Dresser,
332 et al., vs. Hartford Life Insurance Company was affirmed by the Supreme Court of the State of Minnesota, thereby failing to give full faith and credit to such decree as is required by

Article IV., Section 1 of the Constitution of the United States, and which action also violated Article I., Section 10 of the Constitution of the United States forbidding the making of any law impairing the obligation of contracts.

3. That the judgment of said District Court of Ramsey County, Minnesota, is also in violation of Article I., Section 10, of the Constitution of the United States, in this, that the contract sued on provides that the indemnity to be paid thereunder shall be payable out of the "Mortuary Fund and not otherwise" while the judgment of said District Court is a personal one against your petitioner and does not restrict recovery to money in the fund aforesaid.

Petitioner further respectfully shows to the Court that the cause referred to as Dresser, et al. vs Hartford Life Insurance Company in the foregoing paragraphs was an action instituted in the Superior Court of New Haven County, Connecticut, by Charles H. Dresser and others for the benefit of themselves as creditors and certificate-holders, as hereinafter described, and of all other creditors and certificate-holders in said company in similar situation, and in which it was alleged that the certificate holders are so numerous that it is impracticable to make them all parties, in which cause your petitioners, The Hartford Life Insurance Company, and others were defendants.

Your petitioner further respectfully shows to the court that the said cause of Eliza Ibs vs. your petitioner was an action brought by her as beneficiary named in a certain policy of insurance or certificate of membership which had been issued by your petitioner
333 on the life of Herman Ibs, the husband of the plaintiff, who died prior to the institution of said action by plaintiff, to recover the sum of $2,000, the amount which your petitioner promised, by the terms of said certificate, to pay to said plaintiff as beneficiary out of the Mortuary Fund of the Safety Fund Department of said Company, and not otherwise, upon the death of her husband, the insured, provided the terms and conditions of said policy of insurance or certificate of membership had been duly complied with on his part.

In the answer filed by your petitioner to the petition of the said Eliza Ibs, your petitioner, after alleging the failure of the insured to comply with certain conditions of said policy of insurance or certificate of membership, further alleged as follows:

"Defendant further alleges that the contract or certificate sued on is one of many similar certificates issued by the defendant to numerous other members of the Safety Fund Department, Men's Division, of the defendant Company; that each of said certificates provides, as does the certificate sued on, for the levy and collection of assessments, the proceeds of which are to constitute the Mortuary Fund referred to in the certificate sued on, from which, upon the death of the holder of any such certificate the indemnity provided for therein is to be paid; that the indemnity provided for in each of said certificates is payable only out of said Mortuary Fund and defendant is not otherwise liable for the indemnity provided for by said certificates; that under and by the terms of said certificates, the

defendant is the trustee of said Mortuary Fund, that said certificates create an express trust as to such Fund; members holding said several certificates, so long as they are in force, and the member continues alive (and after the death of the member, while the certificate is in force, the beneficiary designated therein) are the Cestuis que trust of said Mortuary Fund; that said Mortuary Fund has always been maintained in the State of Connecticut, that the said fund and the said trust under which it is held is subject to the control and direction of the courts of general jurisdiction of the State of Connecticut, and, particularly of the Superior Court of New Haven County and the Supreme Court of Errors of the State of Connecticut; that the manner in which said mortuary fund and the trust under which it is held shall be administered has been the subject of adjudication by the courts of general jurisdiction of the State of Connecticut, to-wit: by said Superior Court of New Haven County and the Supreme Court of Errors of the State of Connecticut, in the case of Charles A. Dresser et al. vs. Hartford Life Insurance Company, which said courts have jurisdiction over this defendant and over said fund, in which case said courts adjudicated and directed how the said Mortuary Fund should be administered; that a copy of the decrees and judgments of said Superior Court of New Haven County are hereto attached marked respectively Exhibits "B" and "C" and the opinion of said Supreme Court of Errors of the State of Connecticut referred to in said decrees will be
334 found reported in 80 Conn. 681, to which reference is hereby made; that said Mortuary Fund and the trust thereby created is being administered by the defendant strictly in accordance with the terms of said certificates and in accordance with the directions and adjudications of said courts of Connecticut, as shown by said decrees and opinion, that under the terms of said certificates and under the terms of said trust as construed and adjudicated by said courts, the defendant is without authority to pay out of said Mortuary Fund the amount of any certificate of membership, where, as in this case of Herman Ibs, the member has failed or refused to pay the assessment levied against him to maintain said fund.

Thereafter, said cause coming on to be heard, your petitioner offered in evidence an exemplified copy of the record of said judgments and decrees in said cause of Dresser, et al. v. Hartford Life Insurance Company, and specially asserted that under the Constitution of the United States the courts of Minnesota were bound to give full faith and credit to said judgments and decrees, and that said judgments and decrees were excluded by the said District Court of Ramsey County, *to* which action of said court in refusing to admit said judgments and decrees in evidence was at the time duly excepted to by your petitioner.

Petitioner further shows that, upon appeal to the Supreme Court of the State of Minnesota, from the order overruling its motion for judgment, notwithstanding the verdict, and from the order denying its motion for a new trial, it duly assigned the following, among other, errors to the action of the trial court, to-wit:

"4. The court erred in excluding the two decrees of the Superior Court of New Haven County, Conn., in the case of Dresser, et al. v. Hartford Life Insurance Company, et al., because in this ruling it failed to give full faith and credit to such decrees as is required by Article IV, Section 1, of the Constitution of the United States, also because the ruling is in violation of Article I, Section 10, of the Constitution of the United States, forbidding the making of any law impairing the obligation of contracts, also in violation of the United States Constitution, forbidding the taking of property without due process of law.

"9. The court erred in directing a personal judgment against the defendant instead of directing the payment of such judgment out of any mortuary fund it might have under its control (F. 333), because not justified by the evidence or law and in violation of the United States Constitution, Article I Section 10, forbidding the impairment of the obligation of contracts, and the provision forbidding the taking of property without due process of law.

Your petitioner further respectfully shows to the court the right claimed by the petitioner was denied by the Supreme Court of the State of Minnesota in its opinion, submitted herewith, said court holding and determining as follows:

335 "It is claimed that it was prejudicial error to exclude from evidence the decrees in the case of Dresser et al. vs. this defendant, et al., in the Superior Court of New Haven, County, Conn. It is also claimed that in excluding these decrees, the trial court violated Section 1 Article IV of the Constitution of the United States, providing that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state,' and also Section 10, Article I of such Constitution, forbidding any state to pass any law 'impairing the obligation of contracts.' The Dresser case was brought by the plaintiff on behalf of himself and other policy holders of defendant against the company and its officers and the custodian of the Safety Fund.' The main issue in the case was in regard to the Safety Fund and its management, but it was also claimed by the plaintiffs that the defendants, the company and its officers, were levying assessments unnecessary in amount and number for their wrongful purpose. It was adjudged that this was not true. It was claimed that it was improper and wrongful for the defendant to accumulate the margins arising from the difference between the amount of losses paid and the amount of losses assessed for, and to carry this balance in the mortuary fund, and claimed that this balance of margins should be distributed among the outstanding certificate holders, but it was held that it was proper and reasonable that the company should hold some such fund to enable it to pay losses promptly, that the mortuary fund thus formed belongs to the certificate holders, and that the company is reasonably entitled to hold the same as a necessary and proper fund for the payment of death claims.

"We are not able to see how these decrees have any material bearing on the issues in the case at bar, much less how they are

controlling. The issues here are vitally different from those in the Dresser litigation. There was no question there of a forfeiture, nor of the legality of an assessment levied to pay specified death losses, when the balance in the mortuary fund was ample to pay all such losses. The right to hold a balance in the mortuary fund was affirmed, but not the right to forfeit a policy for non payment of an unnecessary assessment. Neither the issues nor the parties were the same as in the case at bar. The decrees are not even authority against the plaintiff's contention here; much less are they binding on the principle of res Adjudicata or estoppel by judgment. This question is discussed and we think correctly disposed of in Johnson vs. this defendant. 166 Mo. App. 261. We hold that it was not error to exclude from evidence the decrees in the Dresser case, and that neither constitutional provisions referred to was violated.

All of which appears by the record and proceeding in said cause which is herewith submitted.

Your petitioner further shows to the court that the certificate of membership sued upon by the said Eliza Ibs in this case, as do all the other membership certificates issued by your petitioner, provides for the establishment and maintenance by your petitioner of a Mortuary Fund, from which fund the death losses incurred by your petitioner are to be paid. It is also provided by the terms of said certificates that this Mortuary Fund shall be replenished at stated periods by means of assessments levied from time to time upon the holders of certificates in force at the time the particular assessments are levied.

336 Your petitioner further shows to the court that this Mortuary Fund has at all times been maintained and administered in the State of Connecticut; that in said case of Dresser, et al. vs. Hartford Life Insurance Company it was adjudged and decreed by the Superior Court of New Haven County, Connecticut, how and in what manner and in what amount this particular fund should be administered and maintained by your petitioner, and your petitioner further respectfully asserts that the refusal of the District Court of Ramsey County, Minnesota, to admit the judgment and decrees rendered in said case of Dresser, et al. v. Hartford Life Insurance Company by the Superior Court of New Haven County, Conn., which court had full control and jurisdiction of said fund, and which ruling of said District Court of Ramsey County was, on appeal, affirmed by the Supreme Court, is in violation of Article IV, Section 1 of the Constitution of the United States, which provides that full faith and credit shall be given to the judgments and decrees of sister state.

Your petitioner shows to the court that by reason of the aforesaid matters and things a right, privilege and immunity was claimed by your petitioner under the Constitution of the United States and was set up and drawn in question and the decision was against the right, title and privilege so set up by your petitioner.

Your petitioner presents herewith an authenticated copy of the record in said case of Ibs vs. Hartford Life Insurance Company and its assignment of errors, and prays for the reversal of said judgment.

Wherefore, your petitioner prays the allowance of a writ or error, returnable into the Supreme Court of the United States and for citation and supersedeas, and your petitioner will ever pray.

HARTFORD LIFE INSURANCE COMPANY, *Petitioner.*
JAMES C. JONES.
EDMUND S. DURMENT.
GEORGE F. HAID,
By JAMES C. JONES, JR.

Endorsed: No. 105894. Filed Ju- 9th 1913. Matt Jensen, Clerk, by G. P. Ritt, Deputy.

337 Southern Surety Company.

General Offices, New National Bank of Commerce Bldg., St. Louis.

Know all men by these presents, That we, Hartford Life Insurance Company, Hartford, Connecticut, as Principal, and Southern Surety Company, of Oklahoma, as Surety, are held and firmly bound unto Eliza Ibs in the full and just sum of Five Thousand ($5,000.00) Dollars, to be paid to the said Eliza Ibs, her executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 26th day of May, in the year of our Lord, One Thousand Nine Hundred and Thirteen.

Whereas, lately at a session of the District Court of Ramsey County in the State of Minnesota, in a suit depending in said court, between Eliza Ibs, Plaintiff, and Hartford Life Insurance Company, Hartford, Connecticut, Defendant, a judgment was rendered against the said Hartford Life Insurance Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Eliza Ibs citing and admonishing her to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date thereof:

Now, the condition of the above obligation is such,

That, if the Hartford Life Insurance Company, Hartford, Connecticut shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation is to be void, else to remain in full force and virtue.

HARTFORD LIFE INSURANCE COMPANY, *Principal,*
By JAMES C. JONES, JR.,
Its Attorney & Agent.
SOUTHERN SURETY COMPANY,
By WM. INGLES, *Vice-President.*

Attest:
T. F. LAWRENCE,
Vice-President.

Attest:
E. J. DAIN, *Secretary.*

[CORPORATE SEAL.]

Accepted and approved.

HORACE A. LURTON,
Asc. Justice.

Filed Jun- 9, 1913. Matt Jensen, Clerk, by G. P. Ritt, Deputy.

338 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

ELIZA IBS, Plaintiff,
vs.
THE HARTFORD LIFE INSURANCE COMPANY, OF HARTFORD, CONN., Defendant.

I hereby certify that the foregoing, attached to the Writ of Error issued from the Supreme Court of the United States of America to review a Judgment in favor of Eliza Ibs and against The Hartford Life Insurance Company, of Hartford, Conn., and my Return on said Writ, are the original Citation to defendant in error, assignment of errors and prayer for reversal, heretofore filed in my office, and a true copy of the Record in said cause with all things concerning the same, viz.: of the Complaint, Amended Answer, Reply, Verdict, Motion for Judgment notwithstanding the Verdict or New Trial, Order Denying the same, the Settled Case, Notice of Appeal on which all the same were reviewed by the Supreme Court of Minnesota, the Mandate from said Supreme Court on which Judgment was entered by this Court on the Verdict, the said Judgment, and copy of opinion of said Supreme Court on said appeal, Petition to Supreme Court for Writ of Error and Supersedeas Bond.

Witness my hand and official seal this 18th day of June, A. D., 1913.

[Seal District Court, Ramsey County, Minn.]

MATT JENSEN,
Clerk of the District Court of Ramsey County, Minnesota,
By N. C. ROBINSON, *Chief Deputy.*

339 STATE OF MINNESOTA,
County of Ramsey, ss:

District Court, Second Judicial District.

I, Matt Jensen, Clerk of the District Court of Ramsey County, State of Minnesota, do hereby certify that the attached and foregoing is a full, true and complete transcript of all the pleadings, proceedings, record entries and settled case, including a copy of the opinion of the Supreme Court of the State of Minnesota, in the

case of Eliza Ibs Plaintiff, vs. The Hartford Life Insurance Company, Hartford, Conn., Defendant, as full, true and complete as the same remain on file and of record in my office.

I do further certify that I have attached hereto the original writ of error with my return thereto and the original citation with proof of service thereof.

In Testimony Whereof, I do hereunto set my hand and the seal of said District Court at my office in St. Paul, Ramsey County, Minnesota, this 18th day of June A. D. 1913.

[Seal District Court, Ramsey County, Minn.]

MATT JENSEN,
Clerk of the District Court of Ramsey County, Minnesota,
By N. C. ROBINSON, *Chief Deputy.*

340 STATE OF MINNESOTA,
County of Ramsey, ss:

I, Frederick N. Dickson, Judge of the District Court for the Second Judicial District in and for the County and State aforesaid, the same being a Court of Record, do hereby certify that the foregoing attestation of Matt Jensen, Clerk of said Court, is in due form, and that I am well acquainted with the handwriting of N. C. Robinson, Chief Deputy Clerk of said Court, and that the signature attached thereto is genuine.

In Testimony Whereof, I hereunto set my hand, this 24th day of June A. D. 1913.

FREDERICK N. DICKSON,
District Judge.

STATE OF MINNESOTA,
County of Ramsey, ss:

I, Matt Jensen, Clerk of District Court for the Second Judicial District, in and for the County and State aforesaid, do hereby certify, that the Honorable Frederick N. Dickson is Judge of the said District Court, duly commissioned and qualified, and was such Judge at the date of the foregoing certificate, and that his signature thereto attached is genuine.

In Testimony Whereof, I have hereunto set my hand and the seal of said District Court, at St. Paul, in said County this 24th day of June A. D. 1913.

[Seal District Court, Ramsey County, Minn.]

MATT JENSEN, *Clerk.*
By N. C. ROBINSON, *Deputy.*

341 In the Supreme Court of the United States.

THE HARTFORD LIFE INSURANCE COMPANY, HARTFORD, CONNECTICUT, Plaintiff in Error,

vs.

ELIZA IBS, Defendant in Error.

In Error to the District Court of Ramsey County, Minnesota.

Statement of Errors Relied upon by Plaintiff in Error and of Parts of Record Necessary for the Consideration Thereof.

To the Clerk of the Supreme Court of the United States:

Please take notice that the plaintiff in error in the above entitled cause expects to rely for a reversal upon each of the errors set out in its assignment of errors and that it deems necessary for the consideration thereof that the entire transcript should be printed, except the following portions thereof, to-wit:

Omit Plaintiff's Exhibit E and insert in lieu thereof the following: "Plaintiff's Exhibit E. This is a list of deceased members, the claims of whose beneficiaries were included in Quarterly Call No. 127, and a copy of which list was sent to each member against whom an assessment was made, and shows the name of the deceased member, his location, date of his death and amount for which he was insured."

Omit Plaintiff's Exhibits H-3, H-5, H-7, H-9, H-11, H-13, H-15, H-17, H-19, H-21, H-23, H25, H-27, H-29, H-31, H-33, H-35, H-37, and H-39, and in each instance insert in lieu thereof the title of the exhibit and then the following: "This exhibit in form, except for date of assessment, time of payment and amount, is substantially like Plaintiff's Exhibit H-1."

Omit Plaintiff's Exhibits H-4, H-6, H-8, H-10, H-12, H-14, H-16, H-18, H-20, H-22, H-24, H-26, H-28, H-30, H-32, H-34, H-36, H-38, and in each instance insert in lieu thereof the title of the exhibit and then the following: "This exhibit in form, except
342 for date of assessment, time of payment and amount, is substantially like Plaintiff's Exhibit H-2."

Omit all of Defendant's Exhibit 15 except the exhibit number, title of the document, and the following portion of the exhibit, to-wit:

"If I or my representatives shall omit or neglect to make any payment as required, in respect of amount, place and time of payment, by the condition of such certificate, then the certificate to be issued hereon shall be null and void, and all money paid thereon shall be forfeited to said company."

Respectfully,

JAMES C. JONES,
Counsel for Plaintiff in Error.

Service of a copy of the foregoing statement is hereby admitted this 12th day of September, A. D. 1913.

C. D. O'BRIEN,
O. E. HOLMAN,
Counsel for Defendant in Error.

343 [Endorsed:] 622/23773. In the Supreme Court of the United States. The Hartford Life Insurance Company, Hartford, Connecticut, Plaintiff in Error, vs. Eliza Ibs, Defendant in Error, Statement of errors relied upon by Plaintiff in Error and of parts of record necessary for the consideration thereof.

344 [Endorsed:] File No. 23,773. Supreme Court U. S. October term, 1913. Term No. 622. The Hartford Life Insurance Company, Hartford, Connecticut, Pl'ff in Error, vs. Eliza Ibs. Statement of errors to be relied upon and designation by plaintiff in error of parts of record to be printed, and proof of service of same. Filed September 17, 1913.

Endorsed on cover: File No. 23,773. Minnesota, Ramsey County, District Court. Term No. 213. The Hartford Life Insurance Company, Hartford, Conn., plaintiff in error, vs. Eliza Ibs. Filed July 2d, 1913. File No. 23,773.

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17

Office Supreme Court, U.
FILED.
OCT 25 1913
JAMES H. McKENN
Cl

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

THE HARTFORD LIFE INSURANCE COMPANY, HARTFORD, CONNECTICUT,
Plaintiff in Error,

vs.

ELIZA IBS,
Defendant in Error.

No. [redacted] 2

IN ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY, MINNESOTA.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

JAMES C. JONES,
JOHN M. HOLMES,
GEORGE F. HAID,
Counsel for Plaintiff in Error.

St. Louis Law Printing Co., Printers' Bldg., Ninth and Walnut. Bell, Main 1819.

In the Supreme Court of the United States.

THE HARTFORD LIFE INSURANCE COMPANY, HARTFORD, CONN.,
Plaintiff in Error,

vs.

ELIZA IBS,
Defendant in Error.

STATEMENT OF THE CASE.

This is an action commenced in the District court of Ramsey county, State of Minnesota, by the defendant in error against the plaintiff in error on a policy of insurance of two thousand ($2,000) dollars. The action was tried before a jury; at the close of the testimony each of the parties moved for a directed verdict, there being no conflict in the evidence. The District court directed a verdict in favor of the defendant in error for the amount of the policy with interest and the jury returned a verdict in her favor for the sum of $2,268.32. The plaintiff in error thereupon appealed to the Supreme Court of the State of Minnesota, and on May 2, 1913, that court affirmed the order of the District court refusing a new trial and remanded the cause to the District Court with directions to enter judgment for the defendant in error upon the verdict. On the 17th day of May, 1913, the District court of Ramsey county rendered a judgment against the plaintiff in error and in favor of the defendant in error for the sum of $2,380.72. The plaintiff in error thereupon presented to this court its petition for the allowance of a writ of error to the District court of Ramsey county, Minnesota. On June 2, 1913, Mr. Justice Lurton allowed the writ with the following notation made thereon:

"I am not clear that this writ should be allowed, but prefer that the doubt shall be solved by the court." (Rec. 6.) The defendant in error submits a motion to dismiss the writ of error for want of jurisdiction, and if that motion should be denied, then for affirmance of the judgment on the ground that the writ was taken for delay only and that the questions on which the decision of the cause depend are so frivolous as not to need further argument.

On the 4th day of April, 1885, the plaintiff in error issued to Herman Ibs a policy of insurance in the sum of two thousand ($2,000) dollars, the defendant in error being named therein as the beneficiary. The insured complied with all the provisions of the policy, and promptly and regularly made payments of all the dues and assessments, except "Call No. 127," which became payable on June 20, 1910. The insured died on the 27th day of June, 1910. The defendant in error sent to the plaintiff the amount of this last Call on the 29th day of June, 1910, and it was received by it not later than the 1st day of July, 1910, and returned to the beneficiary within a month thereafter. (Rec. 60.)

The only defense pleaded is that the insured failed to make the payment due on June 20th, and that under the terms of the policy it was properly canceled. The beneficiary claimed that the payment demanded, that is, "Call No. 127" was unlawful; that the insured was not required to make it, and that failure to pay did not justify the forfeiture of the insurance.

The policy provides that it is issued in consideration of certain assessments levied against the members to form a mortuary fund for the payment of all indemnity matured by the deaths of members, and these assessments, under the terms of the policy, are to be levied against all the members whose certificates are in force at the dates of such deaths. The assessments are to be paid within thirty days from the date of the notices, and the proceeds thereof shall form the mortuary fund, and the death losses are due and payable out of the mortuary fund, and not otherwise. (Rec. 53, 55.)

The policy also provides for the payment of certain expense dues of $3.00 per annum on each $1,000 of insurance, and the dues are to be retained by the insurer as compensation for managing and transacting the business of the department in which the policy was issued. (R. 55.)

On May 2, 1910, the insurer sent to the insured a notice of Call No. 127. This call was made to meet the benefits of $323,919.95, payable on 145 death losses and the expense dues on the policy issued to the insured. The notice of this call states that it includes a mortality call, amounting to $33.95, and quarterly dues to September, 1910, amounting to $1.50, making a total of $35.45. This notice gave the insured until June 5, 1910, to pay the amount of the call, and states that unless the payment called for be paid to the company before the day it falls due, the policy and all payments thereon shall become forfeited and void, and if the payment of the call is not received on or before June 5th a second notice will be mailed giving until June 20, 1910, to remit. (R. 57, 58.)

Accompanying the notice of this call was a statement giving the names of the 145 members who had died, their respective places of residence, the dates of their deaths, and the amount of the insurance carried by them. The heading of this statement is printed in the appended transcript of the record, but the specific names are omitted. (R. 58.)

The insured having failed to respond to the call, the insurer on June 9, 1910, mailed to the insured by registered letter a second notice and enclosed with it a copy of the notice of May 2, 1910. This second notice notified the insured that unless the amount of $35.95, the amount due on the quarterly call including 50 cents for a second notice, be received at the office of the company on or before June 20, 1910, the policy issued to the insured would be canceled. (R. 57.)

For a period of at least ten years prior to the date of the notice of Call No. 127, the insurer invariably followed the practice of sending the insured notices of the respective quarterly calls falling due during that period of time; except as to the

number of the call, the date thereof and the amount, these notices during that whole period of time were precisely the same as the notice of Call No. 127, bearing date May 2, 1910. During all these years the insured was invariably notified that the respective calls were made to meet a certain number of deaths as shown by the accompanying lists, and to meet also the expense dues on the policy. All of these notices stated the amount of the mortality call or assessment and the amount of the quarterly dues; each of these notices stated that unless the payment called for by the notice be made to the company by or before the day it falls due, the policy and all payments thereon would become forfeited and void. No separate demand was ever made by the company for the payment of the quarterly dues, nor was any separate demand ever made for the payment of the mortality call or assessment; the insured never paid his dues or assessments at different periods of time; they were always paid at the same time and in one sum, covering both the dues and assessments. The record hereto attached contains one of these notices, to-wit: Quarterly Call No. 86; it was not deemed necessary to print the notices of the other calls from Call No. 86 to Call No. 126, for as above stated, except as to dates and amounts, they are precisely the same as that of Call No. 86, which is included in the record. (R. 29, 30, 59, 60.)

While the notice of Call No. 127 is dated May 2, 1910, the assessment in fact was prepared and based upon the conditions and data existing on March 31, 1910. (R. 31, 32.) The assessment was levied to raise the sum of $323,919.95, the amount necessary to cover 145 death losses, and the $33.95 included in the notice of May 2nd was the proportionate contribution of the insured to pay these total death losses.

The insurer had, prior to March 31, 1910, paid on account of these death losses out of the mortuary fund raised by prior assessments, the sum of $198,994.19, and there remained on that day an unpaid balance of these aggregate death losses of $124,925.76. (R. 32.)

It is admitted that on March 31, 1910, the insurer had on hand in the mortuary fund the sum of $168,473.58, an amount largely in excess of the balance required to pay all of the outstanding and unpaid death losses covered by Call No. 127. It is apparent that if the insurer had used this balance then on hand, it could have extinguished the whole of its liability incurred for these deaths, and still have on hand in the mortuary fund a balance of $43,547.82. This mortuary fund was absolutely under the control of the insurer and its officers and was absolutely subject to check. (R. 33.)

The return to this court includes extensive testimony relating to the method of calculating Call No. 127 and the condition of the safety fund. There was no controversy about these matters in the court below and no point is made here that the insurer did not follow the proper method of calculating the assessment or that there was any balance in the safety fund applicable to the payment of the assessment and dues included in Call No. 127. It was, therefore, deemed unnecessary to encumber this record by printing any part of that testimony.

The insurer introduced evidence relating to death losses other than those included in Call No. 127 and existing on March 31st and April 30th, 1910, respectively, and the condition of the mortuary fund on the last mentioned date. Since the evidence shows conclusively that the assessment in question was levied solely for the purpose of meeting the 145 death claims, a list of which was sent to the insured, and no other death losses, and that the death losses not included in Call No. 127 were assessed for at a subsequent date and the policy holders were given notice of the deaths with the notice of the assessment, it was held by the State court that such evidence was wholly immaterial to the issues of the action. (R. 35-41, 45-49.)

It appeared, however, from that testimony that the insurer proposed to collect from its policy holders under Call No. 127 the sum of $290,726.86 over and beyond the amount required to pay every approved death loss existing on the 31st day of March, 1910; also that the insurer included in Call No. 127 the

sum of $152,726.86 over and beyond the amount required to pay every reported death loss in existence on March 31, 1910.

The plaintiff in error also offered in evidence two judgments of the New Haven County Superior Court of the State of Connecticut in an action commenced by Dresser et al. v. The plaintiff in error, et al. These judgments were rendered in an action to which neither the defendant in error nor the insured was a party. The main issues of that action were the ownership of a safety fund of $1,000,000.00, held by the Security Company, one of the defendants in that action, in trust for the policy holders; the amount of the compensation to which the surety company was entitled for administrating the trust; and the character of the securities permitted by the contract. The plaintiffs in that action also claimed that the plaintiff in error was levying assessments unnecessary in amount and number, for its own wrongful purposes, and claimed that the balance in the mortuary fund not necessary to pay death claims, should be distributed among the outstanding certificate holders. (R. 71, 74.) These judgments were rendered on the 23rd day of March, 1910, eight days before the assessment in question here was levied and some months before the present cause of action accrued. The rights of the defendant in error in this action were not involved nor considered by the court in rendering these judgments. (R. 63-80.)

The assignment of errors indicate that the sole federal questions claimed to be here involved are that the state court refused to give full faith and credit to the two judgments rendered in the Dresser suit, and thereby violated Article 4, Section 1 of the Constitution of the United States, requiring full faith and credit to be given to the judgments of a sister state, and also Article 1, Section 10, of the Constitution, forbidding the passing of any law impairing the obligation of contracts. It is also claimed that the judgment of the District court of Ramsey county is in violation of Article 1 of Section 10 of the Constitution, in this, that the contract sued on pro-

vides that the indemnity to be paid thereunder shall be payable out of the mortuary fund, and not otherwise, while the judgment of the District Court is a personal one against the plaintiff in error and does not restrict the recovery to the money in the said fund. (R. 1-5.)

None of the other assignments of error present federal questions, since they relate to decisions by the state court based wholly upon the general law and not in any respect upon the Constitution, statutes or treaties of the United States.

We have printed so much of the transcript of the record as we deemed necessary to enable the court to pass understandingly upon the federal questions attempted to be set up by the plaintiff in error. On a motion to dismiss or affirm, it is only necessary to print so much of the record as will enable the court to act understandingly without referring to the transcript. (Walston v. Nevin, 128 U. S. 578; Carey v. Houston R. Co., 150 U. S. 170.)

We do not print the petition for the allowance of the writ of error because it does not constitute a part of the transcript; it contains a copy of a part of the answer and of the opinion of the Supreme Court of Minnesota; these are already included in the record. It also contains some of the assignments of error made by the plaintiff in error in the Supreme Court of Minnesota; these relate to the two provisions of the United States Constitution above mentioned. The Minnesota court in its opinion states that the defendant there claimed that the excluding of the two decrees violated the two sections of the constitution above referred to; but it held that neither of the constitutional provisions was violated. It appears, therefore, sufficiently from the printed record that the plaintiff in error especially set up and claimed these alleged federal questions.

POINTS AND AUTHORITIES.

(1)

THE DECISION OF THE SUPREME COURT OF MINNESOTA IS NOT AGAINST THE TITLE, PRIVILEGE OR IMMUNITY ESPECIALLY SET UP OR CLAIMED BY THE PLAINTIFF IN ERROR UNDER THE UNITED STATES CONSTITUTION; THE STATE COURT GAVE TO THE DECREES OF THE CONNECTICUT COURT ALL THE EFFECT THEY COULD POSSIBLY HAVE.

The plaintiff in error claims by its assignment of errors that the Minnesota court erred in refusing to admit in evidence two decrees of the Superior Court of New Haven county, Connecticut, and claims that in that case there was involved and decided a controlling fact material to the determination of this cause, and bases this claim of error upon the two provisions of the constitution above referred to. (R. 1, 2.)

Considering for the present the constitutional provision, which provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," we think that an examination of the decrees and of the decision of the Supreme Court of Minnesota will convince this court that these decisions are in fact not in conflict and that the state court gave to the Connecticut decrees all the effect to which they are entitled.

Section 237 of Chapter 10 of the Act of Congress approved on March 3, 1911, provides that

> "a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * * where any title, right, privilege, or immunity is claimed under the constitution * * * of the United States and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party under such constitution * * * may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error."

In Winona and St. Peter R. Co. v. Plainview, 143 U. S. 390, the defendant in error moved to dismiss the writ of error issued to the Supreme Court of Minnesota for want of jurisdiction. In granting the motion to dismiss this court said:

> "To present a federal question on the ground that full faith and credit were not given by the state court to the judgments * * * in the Marshall and Illsley cases, it must appear that the state court denied the plaintiff in error * * * some title, right, privilege or immunity held by the plaintiff in error under the judgments * * * and that the decision of the state court was against the title, right, privilege or immunity specially set up or claimed by the plaintiff in error under said constitution or statute. This does not appear by the records. * * * Neither the plaintiff in error nor the Plainview Co. was a party to these suits. * * * The state court gave to the decisions * * * all the effect which they could possibly have."

The judgments offered in evidence were rendered by one of the inferior courts of the State of Connecticut in an action commenced by Charles Dresser and certain other plaintiffs, who then were certificate holders, against the plaintiff in error, the security company and others. The action was commenced about the year 1906 and the judgments were rendered on March 23, 1910, before the assessment in dispute in this action was levied, before the death of the assured, and before the rights of the defendant in error accrued; she was not a party to that action, nor in any way, directly or indirectly, connected with it; neither was the assured a party to the action, nor had he any connection with it of any character whatever. (R. 63.)

In that case the court found as facts that the "allowance made for discontinuance of membership often exceeded the actual amount necessary to cover the deficiency in payments arising from such discontinuance, and that from that source margins of excess of payment arose from time to time," and it also found that other margins arose "between the amount of the losses paid and the amount of the losses assessed for," and that these margins accumulated from time to time in the hands of the insurer in its mortuary fund and were used by it in the

prompt payment of losses in advance of the receipt of the moneys to pay the same from the regular assessments, by which receipts the said fund was constantly reimbursed. (R. 71, 72.)

The plaintiffs claimed that it was improper and wrongful to accumulate these margins and to carry this balance in the mortuary fund, and claimed that the balance of margins should be distributed among the outstanding certificate holders. The court adjudged and decreed that the said balance of the mortuary fund arising from the said excess of the amount received for assessments over the amount necessary for the payment of losses belongs to the certificate holders, but that the insurance company is reasonably entitled to hold the same as a necessary and proper fund for the prompt settlement of death claims, and that when that department of insurance is to be wound up, the balance of said mortuary fund remaining in the hands of the insurance company shall be distributed pro rata among the certificate holders, whose certificates are outstanding at that time. The sole question involved in the Dresser case, insofar as the same relates to the matters under consideration in this case, was whether the policy holders were entitled to an immediate pro rata distribution of the excess or surplus in the mortuary fund, or whether it was proper and reasonable that the company should hold the excess for the purpose of enabling it to pay losses promptly and until the termination of the outstanding insurance contracts. (R. 71-74.)

Is the decision of the Supreme Court of Minnesota in substantial conflict with the decision in the Dresser case? Did the State Supreme court fail to give full faith and credit to the decrees of the Connecticut court? Is the decision of the state court in fact against the right, title and privilege specially set up by the plaintiff in error under Article 4, Section 1 of the Constitution? We think that a careful examination of the decision of the Minnesota court will satisfy this court that that decision was not in such conflict, that it did

not fail to give such full faith and credit, and that it was not against the right set up by the plaintiff in error.

The evidence in this case shows that the plaintiff in error had accumulated in its mortuary fund a large sum in excess of the amount required to pay death losses, and that it was holding and using such excess for the purpose of paying death losses accruing subsequent to the time of the levying of the assessment and in anticipation of future death losses, and the state court holds, "We see nothing in the language quoted, or in other provisions of the contract, that expressly or by necessary implication authorize the insurer to accumulate a 'mortuary fund' out of which to pay death losses that occur in the future." (R. 12.) The court further states:

> "Great stress is laid on the practical necessity of keeping a balance in the mortuary fund. It probably is true that it is convenient and altogether desirable to have money on hand out of which to pay promptly losses that have accrued. And we do not hold that this course is not warranted by the provisions of the contract." (R. 13, 14.)
>
> "We doubt, also, whether defendant could legally have applied the balance in the 'mortuary fund' to the payment of dues of members, as we do not hold that the members were entitled to a distribution of this fund." (R. 14.)

In commenting further on the Dresser litigation the Minnesota court states:

> "The issues here are vitally different from those in the Dresser litigation. There was no question there of a forfeiture, nor of the legality of an assessment levied to pay specified death losses, when the balance in the mortuary fund was ample to pay all such losses. The right to hold a balance in the mortuary fund was affirmed, but not the right to forfeit a policy for non-payment of an unnecessary assessment. Neither the issues nor the parties were the same as in the case at bar. The decrees are not even authority against plaintiff's contention here; much less are they binding on the principle of res adjudicata, or estoppel by judgment." (R. 17.)

The Minnesota court is in entire accord with the decision in the Dresser case in holding that the policy holders are not entitled to a distribution of the excess or surplus in the mortuary

fund, and in holding that it is convenient and altogether desirable to have on hand in the mortuary fund money out of which to pay promptly losses that have accrued. The Minnesota court states expressly that it does not hold that this course is not warranted by the provisions of the contract. The Minnesota court places its decision upon the general law, that "when the balance on hand in the mortuary fund is sufficient in amount to pay all losses that have accrued, an assessment to pay such losses is unnecessary and illegal, at least to the extent that a forfeiture cannot be predicated upon the non-payment of such an assessment"; (R. 14) and the court says:

> "It does not help to say that the proceeds would go to replenish the mortuary fund, or to say that it was necessary and lawful to keep a balance in this fund. Equity, in its abhorence of a forfeiture, will say that, when that fund reaches a sum sufficient to pay all accrued death claims, the beneficiary of a deceased member, who has paid his dues and assessments for twenty-five years, may well claim that a forfeiture cannot be based upon the failure of such member to pay an unnecessary assessment." (R. 14.)

In Blount v. Walker, 134 U. S. 607, there was a motion to dismiss the writ of error issued to the Supreme Court of South Carolina; the motion was sustained. The federal question claimed to be involved in that action was that the Supreme Court of South Carolina had failed to give full faith and credit to a judgment of the Probate Court of North Carolina.

Mrs. Harris, a citizen of South Carolina, died in that state, leaving a last will and testament, by which she devised and bequeathed her estate to such person as Mrs. Blount might appoint by her last will and testament, duly executed. Mrs. Blount died in North Carolina, leaving a last will and testament, by which she devised and bequeathed all her estate to her husband, and directed the trustee appointed by the last will of Mrs. Harris to convey the property of the Harris estate to her husband. Mrs. Blount's will was duly admitted to probate in North Carolina and was also admitted to Probate in South Carolina by exemplified copy of the will. Mrs. Blount's will

was properly executed according to the laws of North Carolina, but was not executed in accordance with the laws of South Carolina. This court held:

> "The Supreme Court of South Carolina did not refuse to the judgment of the Probate Court of North Carolina full faith and credit. * * * When, therefore, the Supreme Court of South Carolina in construing Mrs. Harris' will, arrived at the conclusion that the estate of the latter would only pass to such person as might receive an appointment by a will duly executed according to the laws of South Carolina, that was an end of the case, and whether that conclusion was right or wrong is a matter with which we are not concerned. If we were of a different opinion, and, entertaining jurisdiction, were to reverse the judgment of the Supreme Court of South Carolina, we should do it upon the ground that that court erred in the construction of Mrs. Harris' will, and not upon any ground connected with the judgment of the Probate Court of North Carolina, which could not and did not determine that question. * * * The state court conceded that the judgment of the Probate Court of North Carolina established that the will of Mrs. Blount was her last will and testament duly executed, and its decision did not in the slightest degree proceed upon the denial of that fact, but gave the judgment the same force and effect that it had in North Carolina, for in neither of these states would the will, as such, dispose of the property that did not belong to the testatrix."

The Supreme Court of Minnesota, in construing the contract of insurance in this case, holds that the insurer was not authorized to accumulate a mortuary fund out of which to pay death losses that accrue in the future, and holds that "when this balance on hand is sufficient in amount to pay all losses that have accrued, an assesment to pay such losses is unnecessary and illegal, at least to the extent that a forfeiture cannot be predicated upon the non-payment of such an assessment." This decision was arrived at by a construction of the terms of the contract of insurance under the general law, and was not in conflict with the Connecticut decrees, for they do not purport to pass upon that question and could not have passed thereon, because the issues of that case were not the same as the issues in this case.

The Supreme Court of Minnesota, therefore, did not fail to give full faith and credit to the decrees of the Connecticut Court, and this Court is without jurisdiction, and the writ of error should be dismissed.

(2)

THE DEFENDANT IN ERROR WAS NOT A PARTY OF RECORD TO THE ACTION COMMENCED BY DRESSER ET AL V. PLAINTIFF IN ERROR ET AL; NOR WAS SHE IN PRIVITY WITH, OR REPRESENTED BY ANY OF THE PARTIES OF RECORD.

It will not be claimed that the defendant in error was a party of record to the Dresser suit, nor will it be claimed that the insured, Herman Ibs, was a party to that suit.

In the state court no claim was made that the defendant in error was in privity with any of the parties of record in that suit. In Bigelow v. Old Dominion Copper Min. Co., 225 U. S. 111, it is said:

> "As used when dealing with the estoppel of a judgment, privity denotes mutual or successive relationship to the same right of property."

In 23 Cyc. 1253, the law is stated as follows:

> "Privity means a mutual or successive relationship to the same rights of property; and within the rules relating to the conclusiveness of judgments all persons are privies to a judgment whose succession to the rights of property thereby adjudicated or effected were derived through or under one or other of the parties to the action, and accrued subsequent to the commencement of that suit."

In the state court the insurer claimed that the defendant in error was represented in the Dresser case by the trustee, and therefore, is bound by every fact adjudicated. The insurer there claimed that it was adjudged to be a trustee of the certificate holders of the surplus in the mortuary fund, and since the insurer as such trustee was a party to the Dresser suit, it must be held that the defense of the trustee was the defense of the beneficiaries and that their presence in court was not

necessary to bind their interests. The well settled rule upon this subject is clearly stated in Re Strants estate, 27 N. E. (N. Y.) 259, as follows:

> "It has never been held that in an action by the trustees to reduce such property to possession, or to subject it to their control, it is necessary to make the beneficiaries parties. * * * If the purpose of the action had been, among other things, to determine rights as between the beneficiaries themselves, or as between the trustees and the beneficiaries, then it would have been necessary to bring them in as parties."

In Kerrison v. Stewert, 3 Otto, 155, the law is stated as follows:

> "Where a trustee represents his beneficiaries in all things relating to the trust property, they are not necessary parties to a suit against him by a stranger, to enforce or declare void the trust. In such cases the beneficiaries, although not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party."

In the Dresser case the action was commenced by the alleged beneficiaries against the alleged trustee for the immediate distribution of the trust fund. That was, therefore, a controversy between the beneficiaries and the trustee; it was an adverse proceeding between them, and, of course, the defendant trustee could not also represent the plaintiff beneficiaries.

In the state court the plaintiff in error claimed also that the Dresser suit was an action *in rem*, and that the judgment entered therein is binding upon all interested in the *res*, that is, the excess or surplus in the mortuary fund. In 23 Cyc. (Note) 1407, it is said:

> "A judgment *in rem* differs from a judgment *in personam* in that the latter judgment is, in form as well as substance, between the parties claiming the right; and that it is so inter partes appears by the record itself. It is binding only upon the parties appearing to be such by the record and those claiming by them. A judgment *in rem* is founded on a proceeding instituted, not against the person, as such, but against or upon the thing or subject matter itself, whose state, or condition, is to be determined."

The plaintiff in error in the court below presented the further claim that the defendant in error was a party to the Dresser suit by representation, and it was there claimed that in an action brought by several persons of a class in behalf of themselves and of others in like situation, in which the subject matter of the suit is common to all, the decree is as binding as if all of them were before the court. It is true that the Dresser suit was commenced by some thirty certificate holders in their own behalf and for the benefit of other certificate holders in the same situation; but it is also true that no notice whatever of the pendency of that action was ever given to the insured or to the defendant in error as the beneficiary under the policy, nor did either of these parties in any respect participate in the hearing and determination of that action.

The question as to whether a judgment entered in an action of that character is *res judicata* as to parties of the same class, who were not parties of record to the action, and who were not notified of the proceeding and did not participate therein, was considered and determined in the late case of Wabash R. R. Co. v. Adelbert College, 208 U. S. 38. In that case a writ of error was issued to the Supreme Court of Ohio. One of the federal questions involved was that the decree of the Circuit Court of the United States for the District of Indiana in Ham v. Wabash R .R. Co. was a final adjudication of the issues in the case at bar, binding on the parties and conclusive against the right to maintain the second suit. This court said:

> "The action was commenced by Ham and several other persons, 'on their own behalf, as well as in the behalf of all those in like interest who may come in and contribute to the expenses of and join in the prosecution of this suit'. No notice of the pendency of this suit was given to the other holders of the bonds other than by this allegation in the bill. * * * The judgment in the Ham case was pleaded in the state court in this case as a bar to the suit. The theory of the plea in bar is that the Ham suit was a representative or class suit, and that the judgment in it bound all of the class, even if they were not parties or privies to it. * * * The allegation that the suit is

brought in behalf of all who should join and share in the expense cannot make the judgment binding on those who do not join. * * * It is clear if such suits in the Circuit Court of the United States could have the effect here claimed for them, and the judgments in them were binding in all courts against all other persons of the same class, that injustice might result, and even collusive suits might be encouraged. We find no controlling authority which leads us to such a conclusion. We think that the Ham suit was not a representative suit in the sense that the judgment in it bound the defendants in error, who were not parties to it."

A very recent decision of this Court, wherein were considered some of the questions which we think are decisive of this motion to dismiss or affirm, is the case of Bigelow v. Old Dominion Copper Min. Co., 225 U. S. 111. That was a writ of error to the Supreme Judicial Court of the State of Massachusetts, and the conclusion reached was that the Massachusetts court did not deny full faith and credit to the New York judgment. The question there considered was whether the Massachusetts court gave to a New York judgment pleaded as a bar that full faith and credit required by the constitution. Bearing upon the point now under consideration this court says:

"That he (Bigelow) was not a party to the record is conceded. He had no legal right to defend or control the proceedings, nor to appeal from the decree. He was, therefore, a stranger, and was not concluded by that judgment as a party thereto."

This court quotes from the Massachusetts decision as follows:

"Bigelow could not have appeared as of right and made a defense in that suit. No judgment can be regarded as *res judicata* as to any matter where the rights in the subject matter arise out of mutuality, and not by succession, unless the party could, as a matter of right, appear and defend, even though he may have had knowledge of the suit. Otherwise, he might be bound by a judgment as to which he had never had the opportunity to be heard, which is opposed to the first principles of justice."

Giles v. Little, 134 U. S. 645, was a writ of error to the Supreme Court of the State of Nebraska; the writ was dismissed for want of jurisdiction. The court said:

> "If the state court had refused to give due effect to a final judgment of any court of the United States in a case between the same parties, a federal question would have been presented, which might have been brought to this court for review. * * * The ground most relied on in favor of reversal of the judgment of the state court is its refusal to give effect to the judgments obtained in the Circuit Court of the United States against some of the present plaintiffs by Miles, a grantee of the present defendants. It is argued that the judgments in favor of Miles conclusively showed that some of these plaintiffs had no title, and that, as all these plaintiffs claimed under one title in the present suit, the judgment below in their favor must be reversed as to all of them. As the present defendants did not claim under Miles, and were not parties to his suits, it is difficult to see how judgments in those suits could have any effect as evidence for or against them, by way of estoppel or otherwise."

The case at bar is wholly unlike that of Carpenter v. Strange, 141 U. S. 87. In that case it was held that a federal question was presented by the record. That was a writ of error to the Supreme Court of Tennessee based upon a claim that the court had not given full faith and credit to the judicial proceedings of the New York Court, whose judgment was put in evidence. This court said:

> 'In that suit the parties were the same, the subject matter was the same, the issues were the same, as in this. * * * The decision before us is exactly to the contrary. It obliterates the judgment. * * * It was a judgment by a Court of competent jurisdiction upon the same subject matter, between the same parties and for the same purpose."

COPY BOUND

(3)

THE CAUSE OF ACTION IN THE DRESSER CASE IS NOT THE SAME AS THE CAUSE OF ACTION IN THIS CASE; NOR ARE THE DECISIVE ISSUES THE SAME.

Counsel for plaintiff in error will certainly not claim that the cause of action submitted and determined in the Dresser case is the same cause of action involved in the case at bar. In the state court and in its assignment of errors, the plaintiff in error claims that a "controlling fact" was involved and decided in the Dresser suit, and that the same controlling fact is involved and was decided in this suit.

It is true that in the Dresser case the court found that the company had in its hands a large excess or surplus in its mortuary fund over and beyond the amount required to pay existing death claims, and it is also true that in this case the court found that the insurer had in its hands, at the time the assessment in question was levied, an amount in its mortuary fund which was more than sufficient to pay all the death losses for which the assessment was levied. In this respect, therefore, the facts of the two cases are similar; the Connecticut court held as a conclusion of law "that it is proper and reasonable that the company should hold some such fund for the purpose of enabling it to pay losses promptly." Whether the company had the right to forfeit a policy of insurance for failure to pay an assessment levied to meet specific death losses, when it had on hand in its mortuary fund a surplus in excess of the amount required to pay all the losses for which the assessment was levied, was not considered, litigated or determined in the Dresser suit, but that is the vital question in this case. In the Dresser suit the court determined that this surplus in fact belonged to the policy holders and that ultimately it must be distributed among them pro rata. The sole question there was whether the company should be permitted to hold this surplus so as to enable it to promptly pay death losses. The deter-

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mination of that question, however, did not involve the determination of the other question as to whether the company had the right to forfeit this insurance under such circumstances. In the case of Cromwell v. Sac County, 4 Otto 351, this court held:

> "There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. * * * Where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated or determined. Only upon such matters is the judgment conclusive in another action."

In the case of Russel v. Place, 4 Otto, 606, this court stated the law as follows:

> "It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit."

In the case at bar the Supreme Court of Minnesota held, in speaking of the Dresser litigation:

> "There was no question there of a forfeiture, nor of the legality of an assessment levied to pay specific death losses, when the balance in the mortuary fund was ample to pay all such losses. The right to hold a balance in the mortuary fund was affirmed, but not the right to forfeit a policy for non-payment of an unnecessary assessment. Neither the issues nor the parties were the same as in the case at bar." (R. 17.)

Johnson v. this plaintiff in error, 166 Mo. App. 261, was an action upon a certificate of insurance of like character and of

the same terms as the certificate upon which this action is founded. The defense there was that the insured had failed to pay an assessment levied by the plaintiff in error to pay certain death losses. The defense was met by evidence showing that at the time that the assessment was levied the insurer had on hand in its mortuary fund sufficient money to pay all the death losses for which the assessment was levied. The insurer also claimed in that case that the decrees in the Dresser suit constituted a bar or estoppel to the claim of Johnson upon the certificate of insurance. In discussing the effect of the Dresser decree as a bar or estoppel to the plaintiff's action in that case, the Missouri Appellate Court states:

> "The two cases are not identical in parties, cause of action or decisive issues. Plaintiff was not a party to that suit; there was no question of the forfeiture of her rights involved therein, the issues before us were not considered in that case. * * * Plaintiff stands on entirely different ground from that occupied by the plaintiffs in the Dresser case. This is an action at law and defendant is standing on a forfeiture alleged to have occurred automatically by Johnson's failure to pay an assessment."

It seems useless to burden this court with further discussion of a question that is so clearly considered and decided by the state courts of Minnesota and Missouri, except to add that the rights of the defendant in error to recover upon the certificate of insurance issued to her husband did not exist at the time the Dresser suit was being heard or determined; the beneficiary could not have intervened in the Dresser suit and set up her claim upon the certificate of insurance in which she is named as the beneficiary; she could not have been heard in that action, could not have introduced evidence, examined witnesses or appealed from the decision of that case; therefore, she is in no way bound by the decrees entered therein; they were in no respect material to the issues involved in this case, and this court has no jurisdiction to re-examine the questions determined by the Minnesota court. This Court being without jurisdiction to entertain the writ of error, it should be dismissed.

(4)

THE MINNESOTA COURT WAS AT LIBERTY TO DETERMINE FOR ITSELF THE JURISDICTIONAL QUESTIONS WHETHER, UNDER THE GENERAL LAW, THE DEFENDANT IN ERROR WAS A PARTY TO THE DRESSER SUIT AND WHETHER THE CAUSES OF ACTION OR DECISIVE ISSUES IN THE TWO SUITS ARE THE SAME, AND WAS UNDER NO OBLIGATION TO TREAT THE CONNECTICUT DECREES AS A BAR OR ESTOPPEL TO THIS ACTION.

We think we have satisfactorily shown in the discussion of the last two points that the defendant in error was not a party of record, or in privity with, or represented by, the parties to the Dresser suit, and that neither the causes of action nor the issues of the two suits are the same. The state court refused to decide that the Connecticut Decrees were a bar or an estoppel to the right of recovery in the present action, and based its decision upon the ground that neither the issues nor the parties were the same in the two suits. This decision must necessarily have been based upon the ground that the Connecticut court had no jurisdiction either over the defendant in error or the subject matter of this action. The question arises as to whether the state court had the right to determine for itself this question of jurisdiction, and whether if it was of the opinion that, under the general law, the defendant in error was not a party to the Dresser suit, or the issues in the two suits are not the same, it was under any obligation whatever to treat the Connecticut decrees as a bar to this action.

In the case of Pennoyer v. Neff, 5 Otto, 714, this Court, in referring to the force and effect of judgments rendered against non-residents, said:

> "In the earlier cases, it was supposed that the act (that is the act of congress providing that faith and credit be given to the judgments of sister states) gave to all judgments the same effect in other states which they had by law in the state wherein rendered. But this view was afterwards qualified so as to make the act applicable only when the court rendering the judgment had juris-

diction of the parties and of the subject matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered."

We think that the case of Bigelow v. Old Dominion Copper Min. Co., supra, is decisive of the question now under consideration. In that case the Massachusetts court held that a judgment rendered by the United States Circuit Court for the Southern District of New York did not create an estoppel by judgment. In that case and in several other cases heretofore cited, the judgment, which was claimed to operate as an estoppel, was a judgment of a United States Court. It was held in the Bigelow case that the judgment "in question is entitled to the same sanction which would attach to a like judgment of a court of the state of New York. * * * Its judgment is, therefore, entitled in the courts of another state to the same faith and credit which would attach to a judgment of a court of the state of New York."

In the Bigelow case this court proceeds to discuss and determine the following inquiry, "Did the Massachusetts court deny full faith and credit to the New York judgment by denying to it the effect of estoppel which attached to it in the courts of New York, or may it determine for itself, under principles of general law, whether the judgment was a bar to the suit against Bigelow?"

After a discussion of the authorities this Court proceeds to state the law as follows:

"It is, therefore, well settled that the courts of one state are not required to regard as conclusive any judgment of the court of another state which had no jurisdiction of the subject or of the parties."

"The faith and credit to be accorded does not preclude an inquiry into the jurisdiction of the court which pronounced the judgment, or its right to bind the persons against whom the judgment is sought to be enforced."

"The clause of the federal constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state applies to the records and proceedings of courts only so far as they have jurisdiction. Wherever they want jurisdiction the records are not entitled to credit."

> "The estoppel here insisted upon is grounded not upon actual notice or appearance, but upon a theory as to the relation between joint tort feasors under the laws of New York. If the Massachusetts court was of opinion that, under the general law, that relationship was not such as to make Bigelow a party by either privity or representation, it was under no obligation to treat the New York judgment as a bar to the suit in which it was pleaded."

The court, therefore, reached the conclusion that the Massachusetts court did not deny full faith and credit to the New York judgment. If we understand this decision correctly, then it seems to follow that the Minnesota court had the right to determine for itself and conclusively that the Connecticut court had no jurisdiction over the defendant in error or the subject matter of this action, and that this court, has no jurisdiction to re-examine that question.

In Chouteau v. Gibson, 111 U. S. 200, this court says:

> "The legal effect of the judgment set up in bar is a question of general law as to which the decision of the state court is not reviewable here. The federal questions, if any there were in the case, lay behind this defense and could not be reached until it was out of the way."

In the case of San Francisco v. Itsell, 133 U. S. 66, this Court states:

> "In the present case, the record of the pleadings, findings of fact and judgment shows that it was unnecessary for that court to decide, and its opinion filed in the case and copied in the record shows that it did not decide any question against the plaintiff in error, except the issue whether the former judgment rendered against it and in favor of the grantor of the defendants in error was a bar to this action. That was a question of general law only, in no wise depending upon the constitution, treaties or statutes of the United States.'

We also desire to call the court's attention to the following two cases, from which we quote briefly:

> "It is well settled that where the Supreme Court of a state decides a federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a federal question, and broad enough to maintain the judgment, the writ of error

will be dismissed without considering the federal question."

Hammond v. Johnston, 142 U. S. 73.

"It is likewise settled law that where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the constitution or laws of the United States, another question not federal has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the judgment."

Harrison v. Morton, 171 U. S. 38.

(5)

THE DECISION OF THE SUPREME COURT OF MINNESOTA DOES NOT IMPAIR THE OBLIGATION OF THE CONTRACT WITHIN THE MEANING OF ARTICLE 1 OF SECTION 10 OF THE UNITED STATES CONSTITUTION.

The other federal question attempted to be raised by the plaintiff in error is that, in excluding from the evidence the two decrees of the Connecticut court, the lower court violated Article 1, Section 10, of the Constitution, which provides that "No state shall * * * pass any * * * law impairing the obligation of contracts." The company also assigns as error that the judgment of the District court is in violation of said Article 1, in this, that the contract sued on provides that the indemnity shall be payable out of the mortuary fund, and not otherwise, while the judgment of the District court is a personal one against the plaintiff in error and does not restrict the recovery to the money in that fund.

In the state court the company advanced the claim that the Connecticut decrees determined it to be lawful for it to maintain in the mortuary fund a sum equal to one quarterly assessment, and that such judicial construction of the provisions of the contract became a part thereof, and that the court below violated the provisions of Article 1 of the constitution, because

it held that the insured was not bound to pay the assesment nor dues, and that his failure to do so did not vitiate his policy.

We have already fully discussed the effect of the Connecticut decrees, and we think we have shown that they decided but one question, to-wit: Whether the certificate holders were entitled to an immediate distribution of the surplus in the mortuary fund, and we think we have shown that the court did not attempt to pass upon the question, whether the company had a right to forfeit the policy, when it is admitted it had on hand in its mortuary fund an amount of money more than sufficient to pay every death loss for which the assessment was levied. Even if the company were correct in its position that the Connecticut decrees became a part of the contract of insurance, it would still be true that the company had no right to forfeit the insurance, for, under the general law, it is well established that where an insurance company has on hand in the fund applicable to the payment of death claims sufficient money to pay all the death losses for which the assessment is levied, it cannot forfeit the insurance, even though the insured failed to pay the assessment levied for such death losses.

It is to be observed also that this alleged construction of the insurance contract was not made until a quarter of a century after the contract was entered into; that is to say, the Connecticut decrees were not rendered until the 23rd day of March, 1910, and that was approximately twenty-five years after the date of the policy. It cannot be asserted, therefore, that the company, when it entered into the contract of insurance, relied upon the decision of the state court construing the contract as now claimed by it. In its brief in the state court, the company cited the case of Wade v. Travis County, 174 U. S. 499, where the doctrine is announced that where contracts and bonds have been held to be valid, and the parties who went into the contract or purchased the bonds relied upon a decision of the state court holding them to be valid, and such decision is subsequently changed to the extent that

the contract or bonds are held to be invalid, such subsequent decision would be an impairment of the obligation of the contract, and it is there held that if the law were otherwise, the state would be enabled to set a trap for its creditors by inducing them to subscribe to bonds and then withdrawing their only security. All the cases of that class turn upon the point that the purchaser of bonds relied upon the decision of the state court establishing their validity, and such decision must have been, of course, rendered prior to the time of the purchase of the bonds. These decisions are not at all applicable to the facts of this case.

It was not claimed in the state court, and will not be claimed here, that the insurance contract in question was impaired by any constitutional provision or legislative enactment passed subsequent to the time of the making of the contract and which had the effect of impairing the obligation thereof. Whether the Minnesota court rightly or wrongly construed the terms of this contract, and however glaringly it may have erred in the construction of the contract, this court has no jurisdiction to re-examine that question. The writ of error in this case is issued to a state court and not to a United States court. It is the settled law that this court has no jurisdiction to re-examine the question of impairment of the obligation of a contract by a decision of a state court, where the point is presented to this court through a writ of error issued to a state court. The Wade case above referred to, and the other cases cited by the company in the state court, were brought to this court for review by writs of error issued to, or appeals from, the United States Circuit courts. In the case of Cross Lake Shooting & Fishing Club v. Louisiana, 224 U. S. 632, a writ of error was issued to the Supreme Court of the state of Louisiana. In referring to Article 1, Section 10, of the Constitution, this Court says:

> "This clause, as its terms disclose, is not directed against all impairment of contract obligations, but only against such as results from a subsequent exertion of the legislative power of the state. It does not reach mere

errors committed by a state court when passing upon the validity or effect of a contract under the laws in existence when it was made. And so, while such errors may operate to impair the obligation of the contract, they do not give rise to a federal question. * * * If there be no such law (that is, subsequent law of the state), or if no effect be given to it by the state court, we cannot take jurisdiction, no matter how earnestly it may be insisted that the court erred in its conclusion respecting the validity or effect of the contract; and this is true even where it is asserted, as it is here, that the judgment is not in accord with prior decisions on the faith of which the rights in question were acquired."

Many cases are cited to support this clear statement of the law. In Lehigh Water Company v. Easton, 121 U. S. 392, this court states:

"The state court may erroneously determine questions arising under a contract which constitutes the basis of suit before it; it may hold a contract void which, in our opinion is valid; it may adjudge a contract to be valid which, in our opinion, is void; or its interpretation of the contract may, in our opinion, be radically wrong; but, in neither of such cases would the judgment be reviewable by this court under the clause of the constitution protecting the obligation of contracts against impairment by state legislation, * * * unless that judgment, in terms or by its necessary operation, gives effect to some provision of the state constitution, or some legislative enactment of the state."

In New Orleans Water Works v. Louisiana Sugar Company, 125 U. S. 30, this court, in quoting from an earlier case, states:

"We are not authorized by the Judiciary Act to review the judgments of the state courts, because their judgments refused to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, where the parties setting up a contract alleged that the court had taken a different view of its obligation to that which we held."

We do not deem it necessary to cite any further cases upon the rule of law that is so well established by the decisions of this court; nor do we deem it necessary to cite more than one

case bearing upon the other question that this court has no jurisdiction to review the decision of a state court, which has the effect of impairing the obligation of a contract, where the question is presented to this court by writ of error to a state court, instead of a United States Court. In the case of Bacon v. State of Texas, 163 U. S. 207, this question is fully discussed and conclusively settled. That was a writ of error issued to a state court. The court there says:

> "The argument involves the claim that jurisdiction exists in this court to review a judgment of a state court on writ of error, when such jurisdiction is based upon an alleged impairment of a contract by reason of the alteration by a state court of a construction theretofore given by it to such contract, or to a particular statute or series of statutes in existence when the contract was entered into. Such a foundation for our jurisdiction does not exist."

After referring to two earlier decisions of this court, the court continues to state:

> "In cases of that nature there is room for the principle laid down that the construction of a statute, and admission as to its validity, made by the highest court of a state prior to the issuing of any obligations based upon the statute, enter into, and form a part of, the contract, and will be given effect to by this court, as against a subsequent changing of decision by the state court by which such legislation might be held to be invalid. But effect is given to it by this court only on appeal from a judgment of a United States court, and not from that of a state court. This court has no jurisdiction to review a judgment of a state court made under precisely the same circumstances, although such state court thereby decided that the state legislation was void, which it had prior thereto held to be valid. It has no such jurisdiction, because of the absence of any legislation subsequent to the issuing of the bonds which had been given effect to by the state court."

Counsel claimed at the trial before the District court that the verdict should not have been a general one against the defendant, but that it should have been a verdict against the mortuary fund. This claim was not discussed, either in the briefs

or the oral argument, before the Minnesota Supreme Court, and that court made no reference to, and did not pass upon, the question.

The complaint alleges that the company had in its mortuary fund, at the time the beneficiary's claims accrued, money sufficient to pay her claim, and this is admitted by the answer. (R. 19, 21.) The policy of insurance in effect provides that the sum of $2,000 shall be due and payable to the beneficiary by the insurer at the home office of the company in lawful money of the United States. Having admitted that the company had on hand in its mortuary fund sufficient money to pay the amount of this death loss, the judgment was properly directed against the defendant personally.

It was the insurer's duty, upon proof of the death of the insured, to make an assessment to the full extent authorized to raise funds to pay the beneficiary's claim, and the burden was upon the insurer to show that such an assessment could not, and did not, raise a sufficient sum to pay the beneficiary's claim. In the absence of such a showing the insurer would be required to pay the amount of the policy, whether the amount had been, or could be, collected by the assessment. The insurer in this case made no showing that an assessment could not, and did not raise a sum sufficient to pay the beneficiary's claim; on the contrary, it admitted that it had on hand in the fund, wholly subject to its control and applicable to the payment of the beneficiary's claim, an amount sufficient to pay the same. The judgmnt, therefore, was properly directed against the defendant personally. (See Lake v. Minn. Masonic Relief Association, 61 Minn. 99.) After all, this is a question of general law, and the decision of the state court is conclusive. The point does not involve any federal question whatever.

(6)

THIS COURT CANNOT CONSIDER THE QUESTIONS PASSED UPON BY THE SUPREME COURT OF MINNESOTA, THAT ARE NOT FEDERAL IN CHARACTER; IF THE COURT SHOULD DETERMINE THAT IT HAS JURISDICTION, THEN THE MOTION TO AFFIRM SHOULD BE GRANTED, BECAUSE OF THE FRIVOLOUS AND UNSUBSTANTIAL CHARACTER OF THE ALLEGED FEDERAL QUESTIONS; THE DEFENDANT IN ERROR IS ENTITLED TO DAMAGES, BESIDES INTEREST AND THE COSTS OF THIS MOTION, PURSUANT TO THE RULES OF THIS COURT.

We do not propose to discuss the other questions covered by the opinion of the Supreme Court of Minnesota; we are quite confident that this court has no jurisdiction to consider the alleged federal questions set up by the plaintiff in error.

> "On error to a state court it is only when the federal question has been decided erroneously that other questions may be considered, and then only to see if the judgment can stand notwithstanding the error in deciding the federal question."
>
> McLaughlin v. Fowler, 154 U. S. 663.
>
> Murdock v. Mayor, etc., 20 Wall. 590.

If we should be mistaken in our view that this court has no jurisdiction to consider these alleged federal questions, and if it should be determined that the court has jurisdiction, then we urge that the motion to affirm be taken up by the court and allowed. The very fact that the Justice, who allowed the writ of error, states upon the face of the writ that he is not clear that it should be allowed, seems to us to justify the motion to dismiss, and shows that it is made with color of right. Although the court may determine that it has jurisdiction to entertain the alleged federal questions, nevertheless, if the motion to dismiss is made with color of merit, the motion to affirm should be considered and decided.

> "Color for a motion to dismiss where the claim of a federal question is not so clearly frivolous as to authorize its dismissal may be sufficient to permit the court to pro-

ceed to the consideration of the question involved, where with the motion to dismiss was a motion to affirm on the ground that the writ of error was merely taken for delay."

Douglas v. Wallace, 161 U. S. 364.

"A motion to dismiss a writ of error from the Supreme Court of the United States to a state court will be denied where a federal question is presented by the record, but a motion to affirm will be granted where the question has already been so settled as to need no further argument."

Lowe v. William, 94 U. S. 650.

"Where the federal question presented is so frivolous that it is manifest the writ of error was taken for delay, the motion to dismiss for want of jurisdiction will be overruled, but the motion to affirm will be granted."

Ruckman v. Bergholz, 131 U. S. App. cxliii.

"Where the question raised in a case in the United States Supreme Court is a federal question, the court will not sustain a motion to dismiss; but if there was color for the motion, and the contention made has been often determined adversely, so that the rule may be regarded as settled, a motion to affirm will be granted."

Walston v. Nevin, 128 U. S. 578.

"It has long been the holding of this court that in order to warrant the exercise of jurisdiction over the judgments of state courts there must be something more than a mere claim that a federal question exists. There must, in addition to the simple setting up of the claim, be some color therefor, or, in other words, the claim must be of such a character that its mere mention does not show it destitute of merit; there must be some fair ground for asserting its existence, and, in the absence thereof, a writ of error will be dismissed, although the claim of a federal question was plainly set up."

New Orleans Water Works Co. v. Louisiana, 185 U. S. 344.

The writ of error issued in this case is founded upon frivolous and unsubstantial grounds; for the reasons above given, this court has no jurisdiction to pass upon the alleged federal questions, but if it has such jurisdiction, then it is the duty of the court to grant the motion to affirm, because the federal questions claimed to be involved are frivolous and unsubstantial, and the petition for the writ must necessarily have been made for the purpose of delay.

Section 2 of Rule 23 of the rules of this court provides that in all cases where the writ of error shall delay the proceedings on the judgment of the inferior court and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, shall be awarded upon the amount of the judgment. The defendant in error claims she is entitled to these damages, in addition to the interest and the costs of this motion, because the federal questions set up are so manifestly frivolous and unsubstantial, that it must necessarily follow that the writ was petitioned for solely for the purpose of delaying the collection of the judgment.

In the case of Deming v. Carlisle Packing Co., 33 Sup. Ct. Rep. 80, this court says:

> "The conclusion that a writ of error from the Federal Supreme Court to a state court has been prosecuted for delay is the necessary inference from an order of dismissal because of the unsubstantial and frivolous character of the only asserted federal question.
>
> The power to award damages for delay gives authority to exert that power where in form there is no judgment of affirmance, but only an order for the dismissal of a writ of error to a state court because of the unsubstantial and frivolous character of the asserted federal right."

In Chanute City v. Trader, 132 U. S. 212, in quoting from an earlier case this court says:

> "Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages, and we think this a proper case in which to say that hereafter more attention will be given to that subject, and the rule enforced both according to its letter and spirit. Parties should not be subject to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

The defendant in error has not only been delayed in the collection of her judgment, but has been put to wholly unnecessary expense in contesting the frivolous writ of error issued

at the instance of the plaintiff in error, and where the judgment is as small as it is in this case, the defendant in error should not be obliged to assume the whole burden of that additional expense, when it is occasioned solely by the unjustified conduct of the plaintiff in error.

Respectfully submitted,

C. D. O'BRIEN,
O. E. HOLMAN,
Attorneys for Defendant in Error.

IN SUPREME COURT OF UNITED STATES

OCTOBER TERM, 1913.

HARTFORD LIFE INSURANCE COMPANY, HARTFORD, CONN.,
Plaintiff in Error,

vs.

ELIZA IBS,
Defendant in Error.

Now comes the defendant in error herein by C. D. O'Brien, her attorney appearing in that behalf, and moves this court to dismiss the writ of error in the above entitled cause for want of jurisdiction on the grounds stated in the annexed brief of argument;

And the said defendant in error, by her attorney as aforesaid, also moves the court to affirm the judgment, which is brought before this court by writ of error issued to the District Court of Ramsey county, Minnesota, on the ground that although the record in the said cause may show that this court has jurisdiction in the premises, yet it is manifest that the said writ of error was sued out for delay only, and that the questions on which the decision of the cause depend are so far frivolous as not to need further argument.

Said defendant in error by said attorney also moves the said court for damages under Rule 23 of the rules of said court, and for interest upon the judgment and the costs of these motions.

C. D. O'BRIEN,
Attorney for defendant in error,
Globe Building,
St. Paul, Minnesota.

To James C. Jones, Esq.,

Attorney for plaintiff in error.

Sir:—

Please take notice that on the 27th day of October, 1913, at the opening of the said court at the Capitol in the City of Washington, in the District of Columbia, or as soon thereafter as counsel can be heard, the motions, of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of the court thereon.

Annexed hereto is a copy of the brief of argument and transcript of the record to be submitted with said motions in support thereof.

St. Paul, Minnesota, September 30th, 1913.

Yours respectfully,

C. D. O'BRIEN,
Attorney for defendant in error,
Globe Building,
St. Paul, Minnesota.

APPENDIX.

IN THE SUPREME COURT OF THE UNITED STATES.

THE HARTFORD LIFE INSURANCE COMPANY, HARTFORD, CONNECTICUT,

Plaintiff in Error,

vs.

ELIZA IBS,

Defendant in Error

ON WRIT OF ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY IN THE STATE OF MINNESOTA.

ASSIGNMENT OF ERRORS.

The plaintiff in error, The Hartford Life Insurance Company, Hartford, Connecticut, complains of Eliza Ibs and says that there is manifest error in the record in the above cause and in the decision and judgment of the said District Court of Ramsey County in the State of Minnesota, entered upon the specific order and direction of the Supreme Court of the State of Minnesota in this, to-wit:

First: The said District Court of Ramsey County, Minnesota, failed and refused to admit in evidence a decree of the Superior Court of New Haven County, Connecticut, in the case of Dresser and others v. The Hartford Life Insurance Company and others (Curtis, J.) duly exemplified under and in accordance with the acts of Congress, in which case there was involved and decided a controlling fact material to the determination of this cause, to which ruling the defendant then and there duly excepted, and which said ruling of said District Court was affirmed by the Supreme Court of the State of Minnesota, and by which ruling the court failed to give full faith and credit to such decree as is required by Article IV, Section

1 of the Constitution of the United States and by which ruling the court also violated Article I, Section 10 of the Constitution of the United States forbidding the passing of any law impairing the obligation of contracts.

Second: The said District Court of Ramsey County, Minnesota, also failed and refused to admit in evidence another decree of the Superior Court of New Haven County, Connecticut, in the case of Dresser and others vs. The Hartford Life Insurance Company and others (Shumway, J.) duly exemplified under and in accordance with the acts of Congress, in which case there was involved and decided a controlling fact material to the determination of this cause, to which ruling the defendant then and there duly excepted and which ruling of the District Court was affirmed by the Supreme Court of the State of Minnesota and by which ruling the court failed to give full faith and credit to such decree as is required by Art. IV, Sec. 1 of the Constitution of the United States, and by which ruling the court also violated Article I, Section 10, of the Constitution of the United States forbidding the passing of any law impairing the obligation of contracts, as will appear from the following parts of the record in said cause:

Mr. Durment: "I offer in evidence Ex. 8, certified copy of the judgment in the New Haven Superior Court.

Mr. Holman: That is objected to as incompetent, irrelevant and immaterial, no foundation laid; it appears from the papers that neither the plaintiff nor the insured was a party to the action; it appears from the paper offered that the cause of action there stated is not this cause of action.

The Court: What is the purpose of this?

Mr. Durment: The purpose is this, Your Honor: This is a Connecticut corporation: it appears already in evidence, if not, we will show it by the deposition later, that this Mortuary Fund is kept in Connecticut, and our contention is that it is in the hands of the Company subject to a trust, to pay these claims, the claims against it; that the company has been carried into court in its own jurisdiction, where this fund is in a law suit brought by a number of certificate holders against the defendant and others, to determine their right to the mortuary fund, and their rights and obligation under this contract, and these judgments have adjudicated and determined that matter, and this Company is bound by them and bound to administer that fund in accordance therewith.

The Court: You mean they are Connecticut contracts, and this is the law of Connecticut which is in this contract?

Mr. Durment: Not only that, but further than that, this is a suit here not for personal judgment against this defendant; this is a suit to recover $2,000 out of a certain fund. Now, that fund is maintained under the law of Connecticut and under Connecticut contracts and is located in Connecticut, and

the trustee of this defendant company is in Connecticut, and the funds of this Company are subject to the control of the Connecticut courts in respect to that.

The Court: This is not a decision of the court of last resort?

Mr. Holman: No, just a county court.

Mr. Durment: No, it is made in pursuance of its order.

Mr. Holman: No, order.

Mr. Durment: No, but there are certain features of it that are—It went to a court of appeals, a court of last resort, and the finding of the lower court was modified to some extent.

Mr. Holman: No, no, there was a demurrer to the complaint and that demurrer was sustained by the court below, went up to the Supreme Court and the court below was reversed, it was sent back for trial, and it was then tried by the New Haven court and this decision was rendered in the lower court and never went any higher.

Mr. Durment: But it is a court of competent jurisdiction, which had jurisdiction of the fund and defendant.

Mr. Holman: That is disputed.

The Court: Well, do you want to be heard on that?

Mr. Holman: I do.

The Court: Well, I will hear you Monday morning.

Adjourned until Monday, November 25, 1912, at 10 A. M.

Mr. Durment: When court adjourned we had offered in evidence a certified copy of the decree and presented it to the Court, and before urging that I desire to offer in evidence from the general statutes of Connecticut the revision of 1902, in force July 1, 1902, the Constitution of the United States, and the Constitution of the State of Connecticut (published by the authority of the State, the Hartford Press is the publisher), the case of Lockwood v. Brainerd & Co., 1902. From that I desire to offer Section 1 of Article V of the Connecticut Constitution.

Mr. Holman: Objected to as incompetent, irrelevant, immaterial and no foundation laid.

Mr. Durment: (Reading) 'The judicial power of the state shall be vested in a supreme court of errors, a supreme court, and such inferior courts as the General Assembly shall, from time to time, ordain and establish; the powers and jurisdiction of which courts shall be defined by law.'

And Sections 535 and 536 of the provision itself, on page 207, of this publication.

Mr. Holman: Same objection. All this testimony may be taken, subject to my objection.

Mr. Durment: (Reading) 'Section 535: All civil actions for equitable relief only or for legal relief, only, wherein the matter in demand exceeds $500, and does not exceed $1,000, and all civil actions for both equitable and legal relief, wherein

the equitable and legal relief severally and distinctly demanded exceeds $500 and does not exceed $1,000 may be brought either to the Superior Court or to the Court of Common Pleas, provided that said actions which are within the territorial jurisdiction of the District Court of Waterbury, may be brought either to that Court or to the Superior Court.'

'Sec. 536: All civil actions wherein the relief, legal or equitable, severally and distinctly demanded, exceeds $1,000, shall be brought to the Superior Court, but civil actions in Fairfield County, in which the relief demanded, as aforesaid, exceeds $500 and does not exceed $2,000, including therein appeals from the doings of commissioners in insolvent estates, may be brought or taken to the Superior Court or to the Court of Common Pleas.'

"Now, your Honor, in connection with these statutes that I have read, we renew our offer as to the decisions.

Mr. Holman: I renew the objection that I made on Friday afternoon to the offer of the judgment.

The Court: Just what is this decision.

After Mr. Durment's statement, the Court said:

I don't think the question involved in that case is the question involved in this case. I don't think the decision in that case even settles the law of Connecticut in this case. I think the objection to this ought to be sustained, and I will sustain it.

Mr. Durment: An exception to the ruling, and among other reasons for it, I want to appear in the record that it is (the ruling) in violation of Article IV, Section 1 of the Constitution of the United States, requiring 'full faith and credit' and also Article I, Sec. 10, which prohibits the state from making any law 'impairing the obligation of contracts,' and also of the Fourteenth Amendment, which prohibits depriving one of property without due process of law.

We offer in evidence Ex. 9, which is a certified copy of the decree of the Superior Court of New Haven County, Conn.,—judgment signed by Shumway.

Mr. Holman: Same objection to this offer as I made to the other. Same ruling and exception."

Third: That the judgment of said District Court of Ramsey County, Minnesota, is also in violation of Article I, Section 10 of the Constitution of the United States, in this, that the contract sued on provides that the indemnity to be paid thereunder shall be payable out of the "Mortuary Fund and not otherwise" while the judgment of said district court is a personal one against the plaintiff in error and does not restrict the recovery to the money in the fund aforesaid.

Fourth: The District Court of Ramsey County, Minnesota, erred in not granting the motion to dismiss and in not holding that the failure of the insured to pay his quarterly dues worked

a forfeiture of the policy in accordance with the terms of the contract sued on.

Fifth: The District Court of Ramsey County, Minnesota, erred in not directing judgment in favor of plaintiff in error (defendant below) upon the failure of proof that the insured had ever paid or tendered the amount of his quarterly dues, for the reason that there is no evidence that the Company had in its hands any fund out of which such dues might have been paid.

Sixth: The District Court of Ramsey County, Minnesota, erred in holding that the assessment was illegal because of the balance in the Mortuary Fund, notwithstanding the assessment was made in strict accordance with the terms of the contract sued on.

Seventh: That the District Court of Ramsey County, Minnesota, erred in holding that the assessment complained of was levied to pay anticipated death losses.

Eighth: The District Court of Ramsey County, Minnesota, erred in overruling the plaintiff in error's (defendant below) motion for judgment, notwithstanding the verdict.

Ninth: The District Court of Ramsey County, Minnesota, erred in overruling the plaintiff in error's (defendant below) motion for new trial.

Tenth: The Supreme Court of the State of Minnesota erred in affirming each of the rulings of the District Court of Ramsey County, Minnesota, and in directing judgment to be entered in favor of the plaintiff upon the verdict.

For all of which reasons plaintiff in error prays that said judgment may be in all things reversed, set aside and held for naught, and that this Court direct a judgment to be entered in favor of the defendant in the court below.

THE HARTFORD LIFE INSURANCE COMPANY,
HARTFORD, CONNECTICUT,
JAMES C. JONES,
EDMUND S. DURMENT,
GEORGE F. HAID,
JAMES C. JONES, JR.,
Its Attorneys.

UNITED STATES OF AMERICA, ss.

The President of the United States of America,
To the Honorable the Judges of the District Court of Ramsey County, State of Minnesota, ...
(Seal)

GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, ... before you, or some of you, being the highest

court of law or equity of the said State in which a decision could be had in the said suit between Eliza Ibs, plaintiff, and The Hartford Life Insurance Company, Hartford, Conn., defendant,
wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said The Hartford Life Insurance Company, Hartford, Conn., ... as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the SUPREME COURT OF THE UNITED STATES, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the UNITED STATES, the second day of June, in the year of our Lord one thousand nine hundred and thirteen.

(Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

ALLOWED BY

I am not clear that this writ should be allowed, but prefer that the doubt shall be solved by the Court.

(Signed) HORACE H. LURTON,
Associate Justice of the Supreme Court of the United States.

June 2, 1913.

STATE OF MINNESOTA, SUPREME COURT, ss.

MANDATE.

The State of Minnesota, to the Hon. Judge and officers of the District Court of the Second Judicial District sitting within and for the County of Ramsey. Greeting:

WHEREAS, Lately in your Court, in an action therein pending, between Eliza Ibs, plaintiff, and Hartford Life Insurance Company, defendant, a certain order was entered therein December 9, 1912, from which action of your Court an appeal thereafter was taken to this Court;

AND WHEREAS, The same was duly argued, heard and submitted; and after mature deliberation thereupon had, our Supreme Court did adjudge, determine, decree and ORDER "That the order of the Court below herein appealed from, be, and the same hereby is, in all things affirmed and cause remanded to the court below with directions to enter judgment for plaintiff upon the verdict and that judgment be entered accordingly." A copy of the entry of Judgment thereupon in this Court is herewith transmitted and made part of this Remittitur.

NOW, THEREFORE, This Mandate is to you directed and certified, to inform you of these proceedings had in our Supreme Court, in said hereinbefore mentioned cause, and the same is hereby and herewith Remanded to your Court for such other or further record and proceedings therein as may be by law necessary, just and proper, under and by virtue of the said order herein made.

WITNESS, The Hon. CALVIN L. BROWN, Chief Justice of the Supreme Court aforesaid, and the seal of said Court at St. Paul, this 13th day of May, 1913.

I. A. CASWELL,

(Seal) Clerk of the Supreme Court.

STATE OF MINNESOTA, DISTRICT COURT,
County of Ramsey, Second Judicial District.

ELIZA IBS,

Plaintiff,

against

HARTFORD LIFE INSURANCE COMPANY,

Defendant.

No. .....

Pursuant to the verdict of the jury duly rendered and filed in the above entitled action on the 25th day of November, 1912, and the Mandate of the Supreme Court filed in this office on the 17th day of May, 1913.

Now, on motion of O. E. Holman, Esq., said attorney, It Is Hereby Adjudged that the plaintiff herein recover of said defendant Hartford Life Insurance Company the sum of two thousand three hundred thirty-three 32/100 dollars damages, with forty-seven 40/100 dollars costs and disbursements, in all amounting to $2,380.77.

Signed this 17th day of May, A. D. 1913.

(Seal)

MATT JENSEN, Clerk.
By G. A. JOHNSON, Deputy Clerk.

18088

STATE OF MINNESOTA, SUPREME COURT.

APRIL TERM, A. D. 1913.

No. 166.

ELIZA IBS,

Respondent,

vs.

HARTFORD LIFE INSURANCE COMPANY,

Appellant.

SYLLABUS.

Action to recover on a benefit certificate or policy of life insurance upon the assessment plan, the defense being that the

insured had failed to pay an assessment and an installment of dues, and that the policy had therefore been forfeited.

1. Evidence considered and held to show conclusively that there was no necessity to levy an assessment to pay any part of the death claims to pay which the assessment in question was levied, the mortuary fund on hand available for the payment of death claims being more than sufficient in amount to pay all such claims.

2. The policy does not authorize the levy of an assesment to pay losses that may be anticipated to occur in the future, and in the absence of such authorization, an assessment, that is unnecessary to pay accrued losses, but which is really levied to create a fund out of which to pay future losses, is illegal and the failure to pay such assessment is not ground for a forfeiture of the policy.

3. Though keeping a balance in the mortuary fund for convenience in the prompt payment of losses may be warranted by the contract, yet when such balance is sufficient in amount to pay all losses that have accrued, an assessment to pay such losses is illegal to the extent that a forfeiture cannot be predicated upon the non-payment of such assessment.

4. The assessment in question, though nominally levied to pay specified death claims that had accrued, was in reality levied to create or replenish a fund out of which to pay future losses.

5 It having been the long continued and uniform custom of defendant to give the insured notice of each demand for expense dues, thus giving the insured the right to believe that such notice would be continued to be given, defendant cannot forfeit the policy for a failure to pay dues as to which no notice has been given.

6. The notice given in this case, demanding payment of a single amount, which included the illegal assessment and the quarterly dues, and notifying the insured that unless such amount was paid by a day stated, his policy would be forfeited, made it clear that a tender of the dues alone would have been a vain and idle ceremony, and that the law does not require a tender under such circumstances. Such notice was not a sufficient notice as to the dues.

7. It was not error to exclude from evidence certain decrees of a Connecticut Court, neither the issues or the parties being the same as in the case at bar. Nor did the Court, in excluding such decrees, violate either the full faith and credit clause of the United States Constitution, or the provisions of such constitution forbidding any state to pass any law impairing the obligation of contracts.

Order affirmed.

18088

STATE OF MINNESOTA, SUPREME COURT,

APRIL TERM, A. D. 1913.

No. 166.

ELIZA IBS,

Respondent,

vs.

HARTFORD LIFE INSURANCE CO.,

Appellant.

OPINION.

This is an action to recover upon a certificate of membership, or policy of life insurance upon the assessment plan, issued by defendant to Herman Ibs, in which policy plaintiff was designated as the beneficiary. At the close of the evidence the trial court directed a verdict in favor of plaintiff for the full amount of the policy with interest. Defendant appeals from an order denying its motion for judgment notwithstanding the verdict or for a new trial.

The case was before us at the April, 1912, term on an appeal by plaintiff from an order denying a new trial after a dismissal. Without determining the questions argued on that appeal, we held that there ought to be a new trial to "clarify the claims of the respective parties, and enable the court to determine the case upon the merits as then presented." Ibs v. Insurance Co., 119 Minn. 113. The case is before us now after such a determination on the merits by the trial court. It is not claimed that there was any question in the case for the jury to pass upon, and clearly either plaintiff or defendant was entitled to a directed verdict.

As stated in our opinion on the former appeal, the defense to the action was the failure of the insured to pay the dues and a certain assessment, which were due and payable June 20th, 1910. Plaintiff admitted this failure to pay these dues and this assessment, but claimed that the assessment was unlawful under the terms of the contract, and that the failure to pay the dues did not forfeit the policy because the "call" for the same was coupled with the demand for the illegal assessment, and also because defendant had in its possession at the time of the alleged default money derived from accumulated

interest on its safety fund, which the contract provided should be distributed among the policy holders in reduction of their dues.

This question of the duty of the defendant to apply the insured's proportion of the safety fund in payment of his dues in order to save a forfeiture is not presented on this appeal. The main questions now before us for decision are: (1) was the non-payment of the assessment ground for forfeiture of the policy? (2) if it was not, was the failure of the insured to pay the dues payable June 20th, a sufficient ground?

To determine the legality of the assessment in question, we must look to the language of the contract, and to the facts relating to the purpose for which the assessment was levied.

By the terms of the certificate or policy, issued by defendant to Ibs April 4th, 1885, he agreed to pay and was required to pay assessments proportioned to the maximum indemnity provided for by the policy, which assessments, in the language of the policy, are to be "levied against the herein named member *to form a mortuary fund for the payment of all indemnity matured by deaths of members,* which assessments, to be levied upon all members in the department wherein this certificate is issued, *whose certificates are in force at the dates of such deaths,* shall be made according to the table of graduated assessment ratios given herein, and as further determined by their respective ages and the aggregate maximum indemnity *at the dates of such deaths,* with due allowance for discontinuance of membership."

It is further provided in the policy that the member also agrees to pay said company, *upon all certificates that shall mature by death,* within thirty days from day on which notices bear date, all assessments determined as within set forth, the proceeds of which, after deducting ten cents on each assessment for cost of collection, shall form said mortuary fund."

The facts relating to the levy of the assessment for the nonpayment of which the policy was declared forfeited, are as follows:

The call for the assessment was sent to the insured May 2nd, 1910. The notice states that the assessment "is made to meet 145 deaths (as shown by accompanying list), benefits $323,-919.95." The list accompanying the notice contained the names of 145 deceased members, the claims of whose beneficiaries were included in the call and aggregated the exact amount of the assesment, together with the dates of their deaths, beginning September 28, 1909, and ending February 13th, 1910.

The assessment was based upon condition and data existing as of the date March 31, 1910, and its preparation was begun April 1st. On March 31st, the mortuary fund, made up from the accumulations of prior assessments, amounted to the sum of $168,473.58. Of the death losses to pay which the assess-

ment was levied, and stated in the call, aggregating $323,919.95, there had been paid prior to March 31st, $198,994.19, leaving $124,925.76 unpaid, a sum less by $43,547.82 than the balance then in the mortuary fund. It is plain, therefore, that all of the death losses to pay which the assessment in question was levied, could have been paid out of this mortuary fund, without levying the assessment, and a balance of over $43,000 left in the fund. We think it clear that the necessity for this assessment and its validity must be determined by the condition of the so-called mortuary fund on March 31st, and the amount of the death losses to pay which the assessment was levied according to the notice sent to members. There were some death losses at that date which, though not used as a basis for arriving at the amount of the assessment, and not mentioned in the call, had been reported to defendant, and part of them approved. We hold that these should not be considered. The assessment was not levied to pay such losses, but only the losses stated in the list accompanying the notice. Death losses not included in this list were included in subsequent assessments.

1. We have then this situation. There was no necessity to levy an assessment to pay any part of the losses included in the list attached to the notice. They could all have been paid out of the balance in the mortuary fund, and a balance left in that fund.

Was it legal for defendant to forfeit a contract of a member for the non-payment of an assessment made nominally to pay specified death losses that had already occurred, but in reality to create or replenish a fund out of which future death losses could be paid?

2. We have hereinbefore stated the provisions of the contract that relate to the purposes for which assessments may be levied, and have italicized the language which is pertinent on the question before us. It is true that it is provided that assessments shall be levied "to form a *mortuary fund,*" but it is stated that this fund is for the payment of "all indemnity matured by deaths of members," and that the assessment is to be levied upon all members "whose certificates are in force at the dates of such deaths," and made according to a table of graduated assessment ratios, and "further determined by their respective ages and the aggregate maximum indemnity *at the dates of such deaths.*" And the agreement of the member is to pay *"upon all certificates that shall mature by death,* all assessments determined as within set forth." And it is again provided that the proceeds of such assessments, after deducting the cost of collection, shall "form said mortuary fund."

We see nothing in the language quoted or in any other provisions of the contract that expressly or by necessary implication authorize the insurer to accumulate a "mortuary fund" out of which to pay death losses that occur in the future. The

whole sense of the contract is that an assessment may be levied to pay losses already sustained. Calling the fund obtained by an assessment a "mortuary fund" does not warrant the accumulation of such a fund for the payment of future death claims. This conclusion is strengthened by the long continued and universal custom of the company to state in the notice of each assessment the names of the deceased members to pay the claims of whose beneficiaries the assessment is made, with the dates of their deaths and the amounts of the claims, and by the fact that each assessment is in amount identical with the aggregate amount of the death losses so stated. The necessary effect of a contrary holding would be to authorize the accumulation by assessments of an immense "mortuary fund," when such a fund was wholly unnecessary to pay present claims; this to the great burden of assessed members, and to the advantage of no one. Members would often be obliged to pay for losses that accrued after their own deaths, or after they ceased to be members, contrary to the declarations in the contract that members shall be assessed for the payment of "indemnity matured by deaths of members," *and* upon "certificates that are in force at the dates of such deaths," and that they agree to pay assessments upon "all certificates that shall mature by death."

It is settled law that an assessment to pay future losses is illegal unless the power is conferred by the contract, and we hold that the contract between the insured and defendant cannot be fairly construed as conferring that power. As it is clear that the assessment in question here was not necessary to pay accrued losses but was in reality levied to pay losses that might be anticipated to occur in the future, it follows that it was unauthorized and could not be made the basis of a forfeiture. The case of Schultz v. *Citizens Mutual Life Insurance Co.*, 59 Minn. 308, is decisive on the proposition that an assessment to pay future losses is void if the contract does not authorize an assessment for such purpose, and our decision that the contract does not authorize such an assessment is sustained by *King v. Hartford Life Ins. Co.*, 133 Mo. App. 612, 114 S. W. 63; and Johnson v. Hartford Life Ins. Co., 166 Mo. App. 261; 148 S. W. 631. These cases involve the same form of contracts as the case at bar, and are directly in point. Other authorities on the proposition that an assessment in anticipation of losses is illegal unless authorized by the contract are People Equitable Mutual Life Ins. Co. v. Babbitt, 89 Mass. 236; Rosenberger v. Washington Fire Ins. Co., 87 Pa. St. 207; Hogan v. Pac. End. League, 99 Cal. 248. See also Bacon on Life Insurance, 3rd Ed. Sec. 377, Niblack on Benefit Societies, Sec. 254.

3. Great stress is laid on the practical necessity of keeping a balance in the mortuary fund. It probobly is true that it is convenient and altogether desirable to have money on hand out of which to pay promptly losses that have accrued. And we do

not hold that this course is not warranted by the provisions of the contract. What we do hold is that when this balance on hand is sufficient in amount to pay all losses that have accrued, an assessment to pay such losses is unnecessary and illegal, at least to the extent that a forfeiture cannot be predicated upon the non-payment of such an assessment.

4. It is disputed that the assessment in question was levied to pay anticipated losses in the future. It is true that it was levied to pay specified past death claims, if the purpose was as stated in the notices sent to members. But it is conclusive that it was not necessary to levy any assessment in order to pay the death claims named in the notice, that such death claims were already paid in part out of the mortuary fund, and that all could be so paid and a substantial balance left in that fund. It seems to follow necessarily that the amount realized from the assessment in question would be used to pay future death claims. It does not help to say that the proceeds would go to replenish the mortuary fund, or to say that it was necessary and lawful to keep a balance in this fund. Equity, in its abhorrence of a forfeiture, will say that when that fund reaches a sum sufficient to pay all accrued death claims, the beneficiary of a deceased member who has paid his dues and assessments for twenty-five years, may well claim that a forfeiture cannot be based upon the failure of such member to pay an unnecessary assessment.

5. Having reached the conclusion that the assessment was unnecessary and illegal as to Ibs, it remains to be considered whether his failure to pay the expense dues avoided his contract and justified defendant in forfeiting it. It is conceded that the accumulated interest from the "Safety fund" which the contract provided should be divided between the members in reduction of dues and assessments had been so applied, and that defendant did not have these funds in its possession at the time of the alleged default. We are unable therefore to apply the rule as to the duty of defendant to use funds in its possession belonging to the insured in order to prevent a forfeiture. We doubt also whether defendant could legally have applied the balance in the "mortuary fund" to the payment of dues of members, as we do not hold that the members were entitled to distribution of this fund.

This brings us to a different and perhaps doubtful question, said in the opinion on the former appeal to be an important one. This question was there stated to be "whether the insured was justified in failing or refusing to pay the dues because the notice was coupled with an illegal demand for the assessment."

In the solution of this problem it is not important that there is no evidence that the insured actually based his refusal to pay dues upon this ground. Defendant is seeking a forfeiture.

and if there can be found a valid excuse or justification for the neglect, the beneficiary ought to be permitted to take advantage of such excuse or justification, even though the failure of the insured was actually due to mere neglect, or as quite probable, to illness. In the former opinion it was said that the solution of this question "might to some extent depend upon the question whether defendant was under obligation to give the notice, and whether the insured would have been justified in failing to pay until he received the same." What was not clear when the case was here before is clear now, that is that it was the long continued and uniform custom of the company to give the insured notice of each demand for dues. While the policy did not expressly require such notive, it did not expressly say that notice was unnecessary. It did provide that a printed or written notice addressed to the member should be sufficient for all purposes and reasons may be suggested for the adoption of the uniform custom to give notice. The exact dates for the payment of dues was not definitely fixed by the contract, though we do not say that a member might not figure out the dates when his "monthly or other pro rata installments for periods of less than a year" were payable. While the amount of the dues was fixed at $6.00 per year, or $1.50 per quarter, it appears that the insured might at any time be entitled to a reduction of this amount from his share of the interest from the safety fund. There is abundant ground, both on principle and on authority for holding, as we do, that having given the insured the right to believe that notice of the amount and time for payment of his dues would be given him, the company cannot forfeit the policy for a failure to pay dues as to which no notice has been given. Hartford Life Ins. Co. v. Hyde, —— Tenn. ——, 48 S. W. 968; Mayer v. Mutual Life Ins. Co., 38 Iowa 309; Union Central Life Ins. Co. v. Pattker, 33 Ohio St. 459; Helme v. Philadelphia Life Ins. Co., 61 Pa. St. 107; Grant v. Alabama Life Ins. Co., 76 Ga. 583; Contra, Thompson v. Ins. Co., 104 U. S. 252.

6. Was the notice given the insured in this case sufficient? It was as follows:

"Special notice of Quarterly Call No. 127.

"Herman Ibs,
105 Central Ave.
St. Paul.

"This call, which will be due June 1st, 1910, is made to meet 145 deaths (as shown by accompanying list), benefits $323,919.95, and expenses on your policy as follows:

For Mortuary call	$33.95
For Quarterly dues to Sept. next	1.50
Amount due	$35.45

"Payment will not be accepted later than June 5th, 1910.

"Unless the payment called for by this notice shall be paid to the company at its home office by or before the day it falls due, the policy and all payments thereon will become forfeited and void."

It is perfectly clear that this is a demand for $35.45, the assessment and dues, as one payment. The notice that unless *"the payment* called for by this notice shall be paid" on or before the day it falls due, leaves no room to doubt that a tender of the $1.50 for dues would have been refused. Was the insured obliged to make this tender? True, the demand specified the amount of the dues, but it seems quite apparent that the assessment was the main thing, and that the tender of the dues would have been a useless act.

It is a rule of the law of tender that when the creditor demands an amount larger than he is entitled to, and refuses to receive anything less, a tender of the correct amount is waived. In other words, when it is clear that a tender would have been refused, the law does not require the doing of the vain and useless act of making such tender. 28 Am. & Eng. Ency. of Law, p. 7. A tender is waived where the tenderee takes the position which would render a tender, so long as the position taken by him is maintained, a vain and idle ceremony. 38 Cyc. 135, *Gill v. Newell,* 13 Minn. 462. The company in the case at bar clearly took the position that unless payment of the entire sum, assessment and dues, was made, the policy would be forfeited. It is still maintaining that position. It not only demanded more than it was entitled to receive, but expressly told the insured that unless the entire sum demanded was paid, a forfeiture would result.

We feel fully justified in holding that a tender of the dollar and a half would have been a "vain and idle ceremony," a useless act. This conclusion is amply sustained by the authorities on the subject of tender. In addition to those already cited, we refer to the following: Weinberg v. Naber, 51 Wash. 591, 22 L. R. A. n. s. 956; Bowden v. Dugan, 91 Me. 142; Hamilton v. McLaughlin, 145 Mass. 20. The case of *King* v. Hartford Ins. Co., 133 Mo. App. 619, sustains the position of plaintiff on this point, though the opinion does not state there was a fixed amount payable as dues. The cases relied on by defendant are clearly distinguishable. Our conclusion on this branch of the case is that Ibs was not obliged to do the useless act of making tender of the amount of his dues, and that the notice given him, coupled as it was with a demand for the payment of an illegal assessment, was not a sufficient notice as to dues.

It is claimed that it was prejudicial error to exclude from evidence the decrees in the case of Dresser et al v. This Defendant et al, in the superior court of New Haven County, Connecticut. It is also claimed that in excluding these decrees,

the trial court violated Sec. 1, Article IV, of the constitution of the United States, providing that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other states," and also Sec. 10, Article 1 of such constitution, forbidding any state to pass any law "impairing the obligation of contracts." The Dresser case was brought by the plaintiff on behalf of himself and other policy holders of defendant against the company and its officers, and the custodian of the "safety fund." The main issue in the case was in regard to the safety fund and its management, but it was also claimed by plaintiffs that the defendants, the company and its officers, were levying assessments unnecessary in amount and number for their own wrongful purposes. It was adjudged that this was not true. It was claimed that it was improper and wrongful for defendant to accumulate the margins arising from the difference between the amount of losses paid and the amount of losses assessed for, and to carry this balance in the mortuary fund, and claimed that this balance of margins should be distributed among the outstanding certificate holders, but it was held that it was proper and reasonable that the company should hold some such fund to enable it to pay losses promptly, that the mortuary fund thus formed belongs to the certificate holders, and that the company is reasonably entitled to hold the same as a necessary and proper fund for the payment of death claims.

We are not able to see how these decrees have any material bearing on the issues in the case at bar, much less how they are controlling. The issues here are vitally different from those in the Dresser litigation. There was no question there of a forfeiture, nor of the legality of an assessment levied to pay specified death losses, when the balance in the mortuary fund was ample to pay all such losses. The right to hold a balance in the mortuary fund was affirmed, but not the right to forfeit a policy for non-payment of an unnecessary assessment. Neither the issues or the parties were the same as in the case at bar. The decrees are not even authority against plaintiff's contentions here, much less are they binding on the principle of res adjudicata, or estoppel by judgment. This question is discussed and we think correctly disposed of in *Johnson vs.* This Defendant, 166 Mo. App. 261. We hold that it was not error to exclude from evidence the decrees in the Dresser case, and that neither constitutional provision referred to was violated.

Order affirmed.

(Signed) BUNN, J.

STATE OF MINNESOTA, DISTRICT COURT,
County of Ramsey, Second Judicial District.

ELIZA IBS,

Plaintiff,

vs.

THE HARTFORD LIFE INSURANCE COMPANY, HARTFORD, CONN.,

Defendant.

COMPLAINT.

Plaintiff complains and alleges:

That during all the times herein mentioned the said defendant was, and still is, a corporation duly organized and existing under the laws of the State of Connecticut; that up to the month of January, 1897, the defendant's corporate name was The Hartford Life and Annuity Insurance Company, Hartford, Conn., and that on or about the month of January, 1897, the corporate name of the said defendant was changed to The Hartford Life Insurance Company, Hartford, Conn., and that said defendant was at all the times hereinafter mentioned, and now is, engaged in the business of life insurance within the State of Connecticut and elsewhere, pursuant to the provisions of its articles of incorporation.

That on or about the 4th day of April, 1885, the said defendant, under the name of The Hartford Life and Annuity Insurance Company, Hartford, Conn., duly made, executed and delivered to one Hermann Ibs of the City of St. Paul in the said County of Ramsey, its certificate of membership numbered 70627 and bearing date April the 4th, 1885, in its Safety Fund Department, wherein and whereby, in consideration of the payment of ten dollars ($10.00) on each one thousand dollars ($1,000.00) of the maximum indemnity provided for in said certificate, to be paid by the said insured to create a Safety Fund, and of the payment of three dollars ($3.00) per annum on each one thousand dollars ($1,000.00) for expense dues to be paid by the said insured to the said defendant, and in consideration of the further payment of all assessments duly and legally levied against the said insured to form a Mortuary Fund for the payment of all indemnity matured by deaths of members, the said defendant issued the said certificate of membership in its said Safety Fund Department to the said Hermann Ibs, and the said defendant in and by the said certificate of membership agreed that ninety days from the receipt by the President or Secretary of said defendant, of satisfactory proof of the death of the said insured, there shall be due and payable

by the said defendant out of the said Mortuary Fund the maximum indemnity of two thousand dollars ($2,000.00) to his wife, Eliza Ibs, the said plaintiff, and that in and by the said certificate of membership the said defendant agreed to pay to the said plaintiff, as the beneficiary named in the said certificate, the said sum of two thousand dollars ($2,000.00) out of the said Mortuary Fund, and did thereby insure the life of the said Hermann Ibs for and during the term of his natural life in the said sum of two thousand dollars ($2,000.00), payable to said plaintiff as such beneficiary.

That the said plaintiff was at the time of the issuance by said defendant of the said certificate of membership the wife of the said Hermann Ibs, the said insured, and continued to be the wife of the said insured until the time of his death, and as such had a valuable interest in the life of the said insured.

That on or about the 27th day of June, 1910, at the said City of St. Paul, in said County of Ramsey and State of Minnesota, the said Hermann Ibs, the said insured, died. That the said Hermann Ibs, the said insured, and the said plaintiff each duly fulfilled all the conditions of the said certificate of membership on their part.

That on or about the 22nd day of August, 1910, the said plaintiff duly notified the said defendant of the death of the said insured, and of the date of his death, and requested the said defendant to forward to the said plaintiff, or her attorney, the necessary blanks, so as to enable the said plaintiff, as the beneficiary under the said certificate, to prepare and deliver to said defendant and its President or Secretary proof of the death of the said insured, as required by the terms of the said certificate of membership.

That on or about the 31st day of August, 1910, the said defendant refused to deliver to the said plaintiff blanks as requested by said plaintiff so as to enable her to prepare and submit satisfactory proof of the death of the said insured and on said date last mentioned said defendant disclaimed any liability whatever upon the said certificate of membership and absolutely refused to pay the amount due the said plaintiff upon said certificate of membership, or any part thereof.

That the said Mortuary Fund has at all times since the death of the said insured been sufficient to pay the claim of the said plaintiff under the said certificate of membership, and that since the death of said insured the said defendant has had on hand in said Mortuary Fund and in said Safety Fund Department sufficient money to pay the said sum of two thousand dollars ($2,000.00), together with interest thereon, agreed by said defendant to be paid to the said plaintiff as the beneficiary under said certificate of membership.

That the said defendant has refused to pay the said sum, or any part thereof, and that no part of the said sum covered by

said certificate of membership has been paid, and that there is now due and owing to the plaintiff from the said defendant the sum of two thousand dollars ($2,000.00), together with interest thereon from the 27th day of June, 1910, at the rate of six per cent per annum.

Wherfeore the said plaintiff demands judgment against the said defendant for the said sum of two thousand dollars, together with interest thereon at the rate of six per cent per annum from the 27th day of June, 1910, and the costs and disbursements of this action.

O. E. HOLMAN,
Attorney for Plaintiff,
410 Globe Bldg.,
St. Paul, Minnesota.

(Duly verified.)

(Title of Cause.)

AMENDED ANSWER.

Now comes the defendant and for amended answer to the complaint in the above entitled action:

Admits that it is a corporation duly incorporated under the laws of the State of Connecticut; that formerly its corporate name was Hartford Life and Annuity Company.

Admits that at the time the contract or policy of insurance sued on was issued, the defendant's name was the Hartford Life and Annuity Insurance Company and that since said contract or policy was issued, the defendant has changed its name and is named the Hartford Life Insurance Company.

Admits that on the 4th day of April, 1885, the defendant executed and delivered to Hermann Ibs that certain contract or policy of insurance numbered 70627, but denies that the consideration for the issue of said policy or contract is fully set forth in the plaintiff's petition.

Admits that part of the consideration recited in said policy was the payment of $10.00 on each $1,000 of maximum indemnity provided for by said certificate, to be paid by said insured to create a Safety Fund, the payment of $3.00 per annum on each $1,000 of indemnity provided by said certificate, for expense dues, and the payment of all assessments levied against the insured to form a Mortuary Fund for the payment of all indemnity matured by deaths of members.

Admits that in and by said policy it was agreed that ninety days from the receipt by the defendant of satisfactory proof of the death of said Hermann Ibs there would be due and payable by the defendant out of said Mortuary Fund the maximum indemnity of $2,000 to the plaintiff.

Admits that plaintiff was the wife, and is now the widow of Hermann Ibs.

Admits that the said Hermann Ibs died in Ramsey County, Minnesota, on the 27th day of June, 1910.

Admits that up to the time of his death the said Hermann Ibs had complied with all the conditions, stipulations and requirements in said contract on his part to be performed by him, except in the particulars hereinafter affirmatively pleaded.

Admits that since the death of Hermann Ibs the plaintiff has requested of defendant blank forms on which to make proofs of the death of Hermann Ibs; that defendant refused to furnish such blanks and disclaimed any liability under said certificate.

Admits that the Mortuary Fund referred to in said certificate, at the time of the death of said Hermann Ibs, and at all times since such death, has exceeded $2,000.

Denies that said sum of two thousand dollars ($2,000) is due from the defendant to the plaintiff.

Further answering:

Defendant alleges that on the 4th day of April, 1885, said Hermann Ibs made a written and signed application for the policy or certificate sued on herein, and that in said application the said Hermann Ibs agreed as follows:

"If I or my representatives shall omit or neglect to make any payment as required, in respect of amount, place and time of payment, by the condition of such cetrificate, then the certificate to be issued hereon shall be null and void, and all money paid thereon shall be forfeited to said company."

Defendant alleges that it received and accepted said application and on the faith of the agreement therein contained, as above set forth, issued the policy or certificate sued on herein, which expressly refers to and makes said application a part of said certificate or policy; and by the terms of said policy, it is expressly provided that it is issued in consideration of the

"Payment of $3.00 per annum on each $1,000 for expense dues, to be paid as hereinafter conditioned, and of the further payment of all assessments proportioned to the maximum indemnity herein provided for, levied against the herein named member to form a Mortuary Fund for the payment of all indemnity matured by deaths of members, which assessments to be levied upon all the members in the department wherein this certificate is issued, whose certificates are in force at the dates of such deaths, shall be made according to the table of graduated assessment ratios given herein and as further determined by their respective ages and the aggregate maximum indemnity at the rates of such deaths, with due allowance for discontinuance of membership."

Defendant alleges that said certificate further provides:

"The member agrees to pay to said Company dues of three

dollars per annum on each $1,000 Indemnity, for expenses, on the first day of the month after date of issue hereof, and at every anniversary thereafter, so long as this Certificate shall remain in force; or by monthly or other pro rata installments of the same in advance for periods of less than a year. And also agrees to pay said Company, upon all certificates that shall mature by death, within thirty days from day on which notices beor date, all assessments determined as within set forth; the proceeds of which, after deducting ten cents on each assessment for cost of collection, shall form said Mortuary Fund."

Defendant alleges that in said policy it is expressly provided that the indemnity agreed to be paid shall be payable out of the Mortuary Fund so to be created by assessments as above set forth and not otherwise.

Defendant alleges that said policy further provides:

"The member further agrees and accepts this Certificate upon the express condition that if either the annual dues, assessments or safety fund deposit as hereinbefore required, are not paid to said Company on the day due, then this certificate shall be null and void, and of no effect, and no person shall be entitled to damages or the recovery of any moneys paid for protection while the certificate was in force, either from said Company or the Trustee of the Safety Fund."

Defendant further alleges that said policy provides:

"A printed or written notice, directed to the address of the member, as it appears at the time on the books of the Company, and deposited in postoffice at Hartford, or delivered by an agent of the Company, shall be deemed a legal and sufficient notice for all purposes hereof. A transcript of the books of said Company, testified by the Secretary, showing such facts, shall be taken and accepted as conclusive evidence of the mailing of such notice, and of the facts aforesaid, as set forth in such transcript."

Defendant alleges that said Hermann Ibs elected to pay the dues of three dollars per annum for each $1,000 of indemnity quarterly in advance; and from time to time after the issuance of said certificate he paid his dues quarterly in advance and the Mortuary assessments which were levied against him quarterly until May, 1910.

Defendant alleges that on the 2nd day of May, 1910, the defendant duly made and levied against the said Hermann Ibs, under said policy, an assessment for the sum of thirty-three dollars and ninety-five cents; that said assessment was levied to form the Mortuary Fund for the payment of all indemnity matured by deaths; that said assessment was made according to the table of graduated mortality ratios given on said policy, that said assessment was proportioned to the maximum indemnity named in said certificate, was levied against all the mem-

bers holding similar certificates, and was determined by the ages of members and the aggregate indemnity at the dates of such deaths, with due allowance for the discontinuance of membership, and was made and levied in all respects as required by said policy.

Defendant alleges that notice of said assessment was duly given to the said Hermann Ibs, that the same was dated the 2nd day of May, 1910, and was deposited in the postoffice at Hartford on said date, directed to the address of said Hermann Ibs as it appeared on the books of the defendant at that time; that at the same time and in the same manner and by the same notice it demanded of said Hermann Ibs the payment of one dollar and fifty cents, the quarterly dues for the quarter ending with August 31, 1910; that notice of said assessment and of said dues was duly received by said Hermann Ibs, but that he failed to pay the same within thirty days from the day on which said notice bore date, that is to say, on or before June 1st, 1910; that the defendant extended the time for the payment of said assessment until June 5th, 1910.

Defendant further alleges that the said Hermann Ibs failed and neglected to pay the said mortality call and failed to pay said dues either on or before June 1, 1910, or on or before June 5, 1910, and payment of the same, or either of the same, was not tendered until after June 29, 1910; and that by the terms and provisions of said policy and application, the failure of said Hermann Ibs to pay said assessment, as well as his failure to pay said dues, terminated said certificate or policy.

Defendant further alleges that the contract or certificate sued on it one of many similar certificates issued by the defendant to numerous other members of the Safety Fund Department, Men's Division, of the defendant Company; that each of said certificates provides, as does the certificate sued on, for the levy and collection of assessments, the proceeds of which are to constitute the Mortuary Fund referred to in the certificate sued on, from which, upon the death of the holder of any such certificate, the indemnity provided for therein is to be paid; that the indemnity provided for in each of said certificates is payable only out of said Mortuary Fund and defendant is not otherwise liable for the indemnity provided for by said certificate; that under and by the terms of said certificates the defendant is the Trustee of said Mortuary Fund, that said certificates create an express trust as to such fund; members holding said several certificates, so long as they are in force, and the member continues alive (and after the death of the member, while the certificate is in force, the beneficiary designated therein) are the *cestui que trustents* of said Mortuary Fund; that said Mortuary Fund has always been maintained in the State of Connecticut, that said fund and the said trust under which it is held is subject to the control and direction of the courts of general jurisdiction of the State of Con-

necticut, and, particularly, of the Superior Court of New Haven County and the Supreme Court of Errors of the State of Connecticut; that the manner in which said Mortuary Fund and the trust under which it is held shall be administered, has been the subject of adjudication by the courts of general jurisdiction of the State of Connecticut, to-wit: By said Superior Court of New Haven County and the Supreme Court of Errors of the State of Connecticut, in the case of Charles A. Dresser, et al, v. Hartford Life Insurance Company, which said courts have jurisdiction over this defendant and over said fund, in which case said courts adjudicated and directed how the said Mortuary Fund should be administered; that a copy of the decrees and judgments of said Superior Court of New Haven County are hereto attached, marked respectively Exhibits "B" and "C," and the opinion of said Supreme Court of Errors of the State of Connecticut referred to in said decrees will be found reported in 80 Conn., 681, to which reference is hereby made; that said Mortuary Fund and the trust thereby created is being administered by the defendant strictly in accordance with the terms of said certificates and in accordance with the directions and adjudications of said courts of Connecticut, as shown by said decrees and opinion, that under the terms of said certificates and under the terms of said trust as construed and adjudicated by said courts the defendant is without authority to pay out of said Mortuary Fund the amount of any certificate of membership, where, as in the case of Hermann Ibs, the member has failed or refused to pay the assessment levied against him to maintain said fund.

Wherefore, Defendant shows to the court that it is not liable to the plaintiff in this case; hence it prays to be discharged with its costs.

DURMENT, MOORE & SANBORN,
Attorneys for Defendant,
616-620 Germania Life Building,
St. Paul, Minnesota.

(Duly verified.)

(Title of Cause.)

REPLY.

Plaintiff for reply to the amended answer of the defendant alleges:

That she has not sufficient knowledge or information to form a belief as to the allegations of the said answer contained between line twenty-seven on the second page and line two on the third page of said answer.

Plaintiff admits that the said policy of insurance refers to the said application and makes said application a part of the said policy.

Plaintiff admits the allegations of said answer contained between line seven of the third page thereof and line eighteen of the fourth page thereof.

Plaintiff admits that the said Hermann Ibs from time to time after the issuance of said certificate, paid his dues and Mortuary assessments quarterly.

Plaintiff further admits, said notice of said pretended assessment was given to the said Hermann Ibs, that the same was dated the second day of May, 1910, and was deposited in the post office at Hartford on said date, directed to the address of said Hermann Ibs, as it appeared on the books of the defendant at that time; that at the same time and in the same manner and by the same notice, it demanded of said Herman Ibs the payment of one and 50/100 ($1.50) dollars, the quarterly dues; that notice of said payment and of said dues was received by said Hermann Ibs and that he failed to pay the pretended dues and assessments prior to June 29th, 1910.

Plaintiff alleges that she has not sufficient knowledge or information to form a belief as to the allegations contained between the twenty-sixth line of the fifth page of the said answer and the fifth line of the seventh page thereof.

Except as herein admitted or qualified plaintiff denies each and every allegation contained in the said answer and every part thereof.

For further reply to the said answer plaintiff alleges:

That the said pretended assessment was excessive, unnecessary and unlawful.

That the said policy of insurance provides that all dues and assessments shall be paid within thirty days from the day on which notices bear date. That nevertheless, the said defendant, for many years prior to the time of the death of the said insured, followed and permitted the custom and practice of accepting payments from the said insured after the expiration of such thirty days, and at irregular intervals, after the expiration of such thirty days, and that by said practices and custom said defendant encouraged the said insured in the belief that it would continue to accept payments of dues and assessments within a reasonable time after the expiration of such thirty days, and that thereby the said defendant waived strict compliance with, and performance of, the provisions of its policy of insurance requiring such payment within thirty days from the day on which notices bear date, and that the said defendant is now estopped from alleging that the said insured was in default in the payment of said pretended dues and assessments, and plaintiff alleges that on the 29th day of June, 1910, she remitted to the said defendant the sum of thirty-five and

95/100 ($35.95) dollars in payment of the alleged and pretended assessment and dues referred to in said defendant's answer, and that the said sum of money was received by the said defendant not later than the first day of July, 1910, and retained by the said defendant in its possession until the 31st day of August, 1910, and plaintiff alleges that the said payment of the said alleged and pretended assessment was made within a reasonable time after the expiration of the thirty days referred to in said policy, and in accordance with the practice and custom theretofore existing between the said defendant and the said insured.

Wherefore, plaintiff demands judgment as prayed for in her complaint.

O. E. HOLMAN,
Attorney for Plaintiff,
410-414 Globe Building,
St. Paul, Minnesota.

(Duly verified.)

(Title of Cause.)

SETTLED CASE.

This case came on for trial before Hon. Frederick N. Dickson, J., with a jury on the morning of November 21, 1912. Mr. O. E. Holman appeared on behalf of plaintiff and Messrs. Durment, Moore & Sanborn and George F. Haid, Esq., on behalf of the defendants.

Jury empaneled and sworn.

Mr. Durment: Now, defendant claims the right to open and close to the jury in this case. As I view it the only question on the pleadings is whether or not there was a default in paying this assessment and whether it was a valid legal assessment, and the burden is on the defendant to prove that it was a valid and legal assessment and that they were in default. If that is the situation, why, we have the right.

Mr. Holman: I think we are entitled to open and close the case. The burden would undoubtedly be upon us to show a waiver and an estoppel—no question about that at all, that burden is upon us. The burden may be upon the defendant—I am not sure about that in this case—to prove the validity of its own assessment, and I am going to attack the validity of that assessment in my case, right in the outset.

The Court: You are going to assume that burden, then?

Mr. Holman: I am going to attempt to show that that assessment was an invalid assessment and unlawful. I am going to try this case just like I tried it before, for the very simple

reason that the Supreme Court has said that that trial of this case makes out a prima facie case, under the evidence I propose to offer and the decision of the Supreme Court in this other action where they hold a prima facie case was made out and the court erred in dismissing the action.

The Court: Well, I am going to rule that you have the opening and closing.

Exception by defendant.

Mr. Durment: Now, we move that the plaintiff be compelled to elect between the plea or the defense of an invalid assessment and the waiver. They are inconsistent.

Motion denied.

Exception by defendant.

Mr. Holman then opened on behalf of plaintiff, and offered in evidence Plff's. Ex. A, being policy of insurance or certificate issued by defendant to Hermann Ibs on the 4th day of April, 1885, in the sum of $2,000, the beneficiary named in the policy being the plaintiff, Eliza Ibs; and in connection therewith what is known as trustee's contract between defendant insurance company and the security company of Hartford, Connecticut. This includes everything on all sides of this certificate of insurance.

Received without objection.

Mr. Holman: I now offer in evidence the following portions of the deposition of Thomas F. Lawrence, the secretary of the defendant insurance company, taken at Hartford, Connecticut, in August and September, 1911. And before I offer the deposition I wish to offer in evidence the following stipulation entered into at the time by plaintiff's and defendant's counsel appearing in the deposition:

"It is stipulated by and between the parties hereto that exhibits attached to this deposition which are copies of the original documents may be used at the trial of this case the same as originals without objection on the ground that the original is not attached to the deposition, unless at the time such copy is produced the original is demanded.

I read from page 13 of the deposition:

Q. What is the paper which I now hand you, Mr. Lawrence?

A. It is a copy of the notice of Call No. 127, due June 1, 1910, which was mailed from the office of the Hartford Life Insurance Company on May 2, 1910, addressed to Hermann Ibs. 105 Central Avenue, St. Paul, Minnesota, in connection with Certificate 70,627, issued on his life in the Men's Division of the Safety Fund Department of this Company.

Q. The notice itself being dated what day?

A. May 2, 1910.

Mr. Holman: I offer in evidence notice issued by the Hartford Insurance Company to Hermann Ibs, dated May 2, 1910, being a notice of quarterly call No. 127, as testified to by Mr.

Lawrence. This is marked Ex. B at the last trial and may so stand here.

Mr. Durment: It is the same thing as Ex. 7 to the deposition.

Ex. B read in evidence.

Mr. Holman: I now read from page 14 of the deposition:

Q. What is the paper which I now hand you?

A. It is a copy of the second notice which was sent on June 9, 1910, by registered mail to Hermann Ibs, advising him that the call due June 1st on certificate 70,627, of the Men's Division of the Safety Fund Department on his life, had not been paid and unless $35.95 (including fifty cents additional) was paid on or before June 20, 1910, his policy would be canceled.

Q. Was the original of this notice sent to Hermann Ibs on June 9, 1910?

A. It was.

Q. And the occasion for sending that was due to the fact that the assessment called for in the notice of May 2, which is Ex. No. 7, had not up to that time been paid?

A. That is true.

Mr. Holman: I offer in evidence the second notice just referred to. It was originally marked Ex. D. It does not come in order, but it may be marked Ex. D. In connection with this second notice that I have just offered in evidence I will offer in evidence notice dated June 9, 1910. I will read further from the deposition:

Q. Now, with that notice of June 9th, which is Ex. 8 (in the deposition) was any other paper enclosed to Hermann Ibs?

A. Yes, sir, there was, a copy of the original notice with an addition of the registration fee of fifty cents.

Q. What is the paper which I now hand you?

A. That is a copy of the notice which accompanied the registered second notice of June 9th, which is Ex. No. 8.

Q. And it consists of a duplicate of the first notice with the addition thereon in red ink of the words, "second notice" and "registration fee fifty cents".

A. Yes, sir.

Q. And that was sent with the registered letter notice dated June 9, 1910, which is Ex. 8?

A. It was.

Mr. Holman: Now I offer in evidence notice dated June 9, 1910, marked as Ex. C, and in connection with that I also offer in evidence what is known as the second notice, dated May 2nd and which is a copy or duplicate of the notice already offered in evidence; and the notice dated June 9th may be marked Ex. C and the second notice may be marked Ex. D.

Mr. Durment: Ex. C is Ex. 8 of the deposition, and Ex. D is Ex. 9.

Mr. Holman: It is stipulated between counsel that wher-

ever the figure 2 appears before the number of the policy it is intended to indicate the amount of this particular policy.

I will read further from the deposition:

Q. What is the paper which I now hand you and which will be marked Ex. 10?

A. It is a copy of the list of members whose claims were included in quarterly call 127 due June 1, 1910.

Q. Was a copy of that sent to Hermann Ibs?

A. A copy of that was sent to Hermann Ibs on May 2, 1910, with the notice of that call.

Q. Which is Ex. No. 7?

A. Which is Ex. No. 7.

Q. And how were Exhibits Nos. 8 and 9, being the registered letter notice and the second notice of assessment which accompanied that notice, sent to Hermann Ibs?

A. By registered mail.

Q. And addressed to him at what address?

A. At 105 Central avenue, St. Paul, Minnesota, which was his address as it appeared on the books of the company at that time.

Mr. Holman: Now, I offer in evidence the list of 145 members sent to the insured on May 2, 1910, and received by the insured. This may be marked Ex. E, and is the same as Ex. 10 of the deposition. (Read to the jury.)

Mr. Holman: Now, I want to offer in evidence the notices sent by the defendant, Hartford Life Insurance Company, to the insured, Hermann Ibs, beginning with the notices of quarterly Call No. 86, to and including (all the intermediate calls) No. 126. These notices are notices sent by the Hartford Life Insurance Company to the insured, and each of them marked paid on the respective dates on which they were paid, every notice is marked paid, and the date of payment is stamped on it.

Mr. Durment: I don't know exactly what counsel's theory or purpose of offering these is. There isn't any question but they were sent and paid. That is admitted in the pleadings.

Mr. Holman: And recieved by the insured?

Mr. Durment: Yes. I say they were received by the insured. That is admitted in the pleadings, and they were paid. It seems to me they are immaterial.

Mr. Holman: The purpose of this is to show that the defendant followed a practice and custom of sending out these notices during these ten years prior to this last Call 127.

The Court: Showing the dates they received payments.

Mr. Holman: And all the dates and the character of the call. These calls are all like the last call in phraseology and it shows this custom.

Objected to as immaterial. The facts as stated by counsel are true.

The Court: You admit they are authentic?

Mr. Durment: Well, I have not seen them. I have no doubt they are.

The exhibits were marked Ex. H-1 to Ex. H-40, inclusive.

The objection was overruled.

Exception by defendant.

Mr. Durment: We object to these at this time. Undoubtedly this dividend is the dividend from the Safety Fund income. I don't think there is any question about that.

Mr. Holman: No other dividend occurs to me at this time except the accumulation of this Safety Fund and the income of the Safety Fund.

Mr. Durment: Well, if it is agreed, it is understood that is where the dividend is from, I have no objection to it.

The Court: Well, they will be received in evidence.

Mr. Holman: I read from page 17 of the deposition:

Q. About what date did you receive the letter of Mrs. Hermann Ibs which is Ex. 13 (17).

A. It must have been on July 1st, possibly June 30th.

Mr. Holman: I offer in evidence letter dated St. Paul, June 29, 1910, signed by Mrs. Hermann Ibs, not by Hermann Ibs, and addressed to the Hartford Life and Annuity Insurance Company, Hartford, Connecticut, being the letter just referred to in the deposition of Mr. Lawrence. It is agreed that a copy of that letter may be offered instead of the original. (Marked Ex. I and read in evidence.)

Q. What did you do on receipt of the letter of June 29th and which contained the money order which I have referred to?

A. The certificate, No. 70627, on the life of Hermann Ibs, having already lapsed and cancelled in accordance with its terms, we wrote to Hermann Ibs to the effect that his certificate had been cancelled and could only be reinstated after furnishing the company with satisfactory evidence of insurability, without expense to the company.

Q. And is the paper which I now hand you and which will be marked Ex. 21, a copy of the letter which you say you so wrote?

A. It is.

Q. Please state whether you got any answer to your letter of July 1st to Hermann Ibs, which is Ex. 21, prior to July 29, 1910.

A. We did not.

Mr. Holman: I now offer in evidence letter dated July 1, 1910, addressed to Mr. Hermann Ibs, 105 Central avenue, St. Paul, Minn. (Marked Ex. J and read in evidence.)

Page 22 of the deposition:

Q. The next information which you received in connection with this policy was what?

A. The next communication with reference to this policy

that the company received was a letter dated August 22, 1910, from O. E. Holman, attorney at law, St. Paul.

Mr. Holman: I offer the letter in evidence. The original is attached to the deposition and I have a copy of it. (Marked Ex. K.)

Q. Did you make any response to that letter?

A. We did.

Q. And is this a copy of your response?

A. This paper is a copy of our response to Mr. Holman's letter of August 22nd; the response is dated August 31st, 1910.

Mr. Holman: I offer in evidence letter from the defendant to myself, dated August 31, 1910. (Marked Plff's. Ex. L.)

Q. How many members approximately had you in the Men's Division of the Safety Fund Department in April and May, 1910?

A. Why, I should say about 13,000; I could verify that.

Q. I don't care for it any more particularly than that. How long approximately does it take you to make this calculation and prepare your records and get out and mail the notices for each assessment?

Objected to as immaterial.

Objection overruled.

Exception by defendant.

A. It takes an entire month. There is a tremendous amount of detail work connected with the getting out of an assessment. In the first place, to find out the amount of insurance there is in force at each age we have to make all our cancellations and reduce the amount of insurance that was in force.

Mr. Haid: It is "cancellations" here, but I think it should be "calculations."

Mr. Holman: I guess "all our calculations," I should think that is what it should be; it appears in the deposition as "cancellations."

Mr. Haid: Well, we will agree, if you think it makes any difference.

Mr. Holman: I don't think it makes any difference. "Calculations," I should think. Just change that to "calculations."

Q. Now, coming down to Call 127, I will get you to state whether you calculated the amount which would have been produced by an assessment by one rate upon each member of the Safety Fund Department of the Men's Division at his then attained age, at or about the time that that assessment was begun to be levied?

A. We did.

Q. And what was the date at which you began to prepare that assessment?

A. April 1, 1910.

Q. Just following March 31st?

A. Yes.

Q. And the assessment was based upon conditions and data ascertained as or about that date?

A. Yes, as of March 31st.

Q. Now, Mr. Lawrence, I will get you to tell me what the amount of mortuary fund on hand was on March 31st, 1910.

Mr. Durment: We object to that as incompetent and immaterial, and I wish to be heard on that proposition, your Honor, before the ruling is made.

The objection was argued at some length by respective counsel in the absence of the jury, and the Court reserved the ruling.

Adjourned until the morning of November 22, 1912.

The Court: The objection to the introduction of this evidence in reference to the condition of the mortuary fund at the time the assessment was made is overruled.

Exception by defendant.

A. On March 31, 1910, the mortuary balance on hand was $168,473.58 in the Men's Division of the Safety Fund Department.

Q. (p. 33.) Now, you have stated on Call No. 127 you assessed for death losses, for which an assessment had not theretofore been levied, to the aggregate of what amount?

A. $323,919.95.

Q. Of that sum and of those death losses for which an assessment was then levied how much had theretofore been paid from the mortuary fund?

Objected to as incompetentand immaterial.

Objection overruled.

Exception by defendant.

A. $198,994.19.

Q. And how much of such death losses ($323,919.95) were then unpaid?

Objected to as incompetent and immaterial.

Objection overruled.

Exception by defendant.

A. $124,925.76.

Q. Now, on March 31st, 1910, you levied assessment Call 127 to cover death losses amounting to $323,919.95, did you not?

A. We did.

Q. And on that date of those death losses which you covered by that assessment there had been in fact paid prior to March 31, 1910, the sum of $198,994.19; is that so?

A. That is so.

Q. Leaving therefore an unpaid balance of death losses for which you levied assessment 127 of $124,925.76?

A. That is right.

Q. And you had at the same time on deposit a balance in the mortuary fund amounting to $168,473.58?

A. That is right.

Q. How much of this assessment insurance was in force March, 1910?

Objected to as immaterial.

Objection overruled.

A. About $26,000,000 in the Men's Division.

Q. (Page 80) This mortuary fund is absolutely in the control of the defendant and its officers, is it not?

A. Absolutely, subject to check.

Q. (P. 40) Please state what was done with the proceeds levied against each member of the Men's Division of the Safety Fund Department as it was received from time to time by the defendant company. To what fund did it go?

A. The proceeds of the assessment which was assessed for mortality went into the mortuary fund, all of it.

Q. And that fund was used for what purpose?

A. For the payment and settlement of death claims.

Q. And were the death claims of the Men's Division of the Safety Fund Department paid from the Mortuary Fund?

A. They were.

Q. The aggregate of the assessments collected by the defendant for the Men's Division of the Safety Fund Department have exceeded the amount that has been paid out from the Mortuary Fund, and what has become of the excess of such amounts of assessments over the death losses paid and where is that money?

Objected to as immaterial.

Objection overruled.

Exception by defendant.

A. In the mortuary fund.

Q. And applicable and has been used for the payment of death losses incurred in the Men's Division of the Safety Fund Department?

A. Yes, and for no other purpose.

Mr. Durment: If the Court please, we move that the case be dismissed for failure of the plaintiff to establish a cause of action. The only thing in the case upon which plaintiff can claim that he has made a prima facie case is upon the amount he has shown was in the mortuary fund on the 31st day of March, 1910—which was a month before the assessment was actually levied, two months before it was collected—and he has not shown anything improper or illegal in the accumulation of that fund, nor has he shown in any way that this money belonged to the plaintiff.

The Court: There is no testimony with reference to the safety fund.

Mr. Holman: Well, then I will have to offer that. I will just offer that testimony that I offered at the former trial.

The Court: The case is reopened then.

Q. (p. 12.) How often do you levy assessments in relation to the Safety Fund Department?

A. Quarterly.

Q. And those notices of assessment bear what date?

A. Bear date of thirty days prior to the date that the call is due. Our assessments are levied quarterly, as I stated, and are due on the first days of March, June, September and December in each year.

Q. And those notices are dated and sent out approximately the first day of February, May, August and November of each year?

A. Yes, sir.

Q. And I use the term approximately because they are sent out thirty days in advance of the date on which they are due; they might be dated the 2nd of the months of February, May, August or November, or even the 3d, or in some instances a day or two within the end of the preceding months that I have mentioned?

A. That is right.

Q. Now, those assessments being dated on that day, which is approximately as I have stated, the first days of February, May, August and November, state whether they are mailed on the days when they are dated.

A. The notices are mailed on the days they are dated.

Q. Now, then, having stated that it takes thirty days to prepare the assessment and the notices of assessment, as you have described, the data on which the assessment is levied is begun to be prepared approximately thirty days in advance of the date on which the notices bear date?

A. That is true.

Q. So that the assessment is begun to be prepared for the purpose of levying approximately on the first days of January, April, July and October of each year; is that correct?

A. That is true.

Q. It might start a day or two before that, or it might start a day or two after the 1st day of each month?

A. It might.

Q. And it is necessary to thus start the preparation of this assessment, calculate it from data, thirty days in advance of the notice because of the impossibility of doing all of that work and complete it on the day of the notice?

A. It would be absolutely impossible to do otherwise.

Q. On the receipt by the defendant of Ex. 13, being the letter of June 29, 1910, and the papers which accompanied that which you say included a postoffice money order for $35.95, state whether or not the money order was used by you; by which I mean whether it was deposited in the bank or collected by the defendant company.

A. It was not used by the company.

Q. Did you on that day, July 29th, write the letter, a copy of which I am now handing you, and which will be marked Ex.

22, and please state whether that is the carbon copy of the letter which you wrote to Hermann Ibs on that day, which was made at the same time that the original letter was written?

A. It is; that carbon copy was made at the same time as the original letter which was written to Hermann Ibs on the 29th day of July, 1910.

Objected to as not proper cross-examination.

Objection overruled.

Q. How was that letter sent to Hermann Ibs?

A. That letter was sent by registered mail.

Q. (p. 32.) Now please proceed and state to us the amount of death losses incurred or theretofore unassessed for, then state the amount of death losses that were assessed for on Call 127, and then state the amount of death claims unassessed for at that time, referring always, unless otherwise specified, to the Men's Division of the Safety Fund Department.

A. On March 31, 1910, there were incurred death losses which had not been previously assessed for, $540,000. Call No. 127 included death losses amounting to $323,919.95. Of the death losses incurred but theretofore unassessed for on March 31, 1910, there was $216,080.05 of death losses which were not included in Call 127.

Q. Now, of the $540,000 of death losses which had been incurred on March 31, 1910, which were up to that time unassessed for, had any portion of those been paid out of the mortuary fund of this association of the Men's Department?

A. Yes.

Q. How much?

A. $200,333.33.

Q. What was the amount of death losses theretofore incurred and theretofore unassessed for which were unpaid?

A. On March 31st there were unpaid death losses amounting to $339,666.67.

Mr. Durment: I am not offering these three questions that I read now, because they are already in and went in over my objection, but for the sake of making the record clear, at Mr. Holman's request, I will read them:

Q. Now, you have stated on Call No. 127 you assessed for death losses, for which an assessment had not theretofore been levied, to the aggregate of what amount?

A. $323,919.95.

Q. Of that sum and of those death losses for which an assessment was then levied, how much had theretofore been paid from the mortuary fund?

A. $198,994.19.

Q. And how much of such death losses ($323,919.95) were then unpaid?

A. $124,925.76.

Mr. Durment: From here on I am offering, myself.

Q. What were the death losses which were incurred in the Men's Division of the Safety Fund Department subsequent to March 31 and between that date and April 30th?

Objected to as immaterial, incompetent and irrelevant, not cross-examination.

Objection sustained as not cross-examination.

Exception by defendant.

Mr. Durment: We offer to show the amount remaining in the mortuary fund on the 2nd of May, at the time this assessment became an assessment, as we claim, the date of the notice and the amount of unassessed-for claims against the fund on that date, and the amount of unpaid unassessed-for claims at that date by the deposition here in connection with what plaintiff's counsel has offered in evidence.

Objected to as not proper cross-examination.

Sustained. Exception by defendant.

Q. (p. 62.) Assuming that your statement of the amount of death losses on March 1, 1910, which you have stated was $540,000, is correct, the fact nevertheless is that on that day there was unpaid of those death losses the sum of $339,666.67, and no greater amount?

A. That is correct, there were unpaid death losses on that date of $339,666.67.

Q. The fact is also on that date you had on hand in cash in your mortuary fund an unexpended sum of $168,473.58?

A. That is true.

Q. And that fund was applicable to the payment of those death losses which had been incurred on the 31st day of March, 1910?

A. Applicable for the payment of death losses in the Men's Division of the Safety Fund department.

Q. There was nothing to prevent the company from using that $168,473.58 in the payment of the death losses, which were due and unpaid on the 31st day of March, 1910, was there, or such portion thereof as that balance would cover?

A. I cannot answer that yes or no. I think that undoubtedly there was a reason why the company could not apply this balance then in the mortuary fund to the death losses included in Call 127 which at that time were outstanding.

Q. That fund of $168,473.58 was deposited to the credit of the defendant company in the banks in this city or elsewhere, subject to check, was it not?

A. It was.

Q. Were there on the 31st day of March, 1910, matured contracts due and payable on that day to the extent of the mortuary balance? I mean death losses of which proper proof of claim had been furnished and which were then payable?

A. Of the $540,000 of death losses which were outstanding March 31, 1910, a part represented death losses on which the

company had received proofs of death and on which the claims had been approved, but which were not yet due; also death losses in process of adjustment and not yet due, and also death losses reported, but no proofs received and not yet due. I cannot state the separate amounts under those three heads.

Q. (p. 66.) At that time the company had on deposit in banks a cash balance in the mortuary fund of $168,473.58; is that correct? I refer to March 31, 1910.

A. It is.

Q. That balance in the mortuary fund was subject to check by the officers of the company?

A. It was.

Q. And it was within the discretion of the officers of the company as to whether they would then use the whole or a portion of that mortuary balance in payment of a part of these unpaid death losses which had been approved on the 31st day of March, 1910?

A. It was in their best judgment as to the benefit of the membership to so use the mortuary balance that no claims would come due by reason of the ninety days expiring before June 1st, the date when the next call would come in, with no money on hand, with no balance on hand in the mortuary fund to pay these claims.

Q. (p. 70.) Were there any unpaid assessments or calls in course of collection on March 31, 1910?

A. There were not.

Mr. Holman offered the following:

Q. (p. 65) Of the $540,000 of death losses on March 31, 1910, to which you have referred, what amount had been proved up properly and allowed by the company at that time?

Mr. Durment: We object to that as immaterial.

Mr. Holman: I offer to show that on that date $402,000 of this $540,000 had been approved by the company.

Objection overruled.

Exception by defendant.

A. Of that $540,000 of death losses proofs had been received in connection with death losses amounting to $402,000, and those claims have been paid.

Q. Now, of that amount you had paid prior to March 31st the sum of $200,333.33?

Objected to as immaterial.

Objection overruled.

A. Yes.

Q. Had proof of loss been furnished as to any other part of the $540,000 of death losses?

Objected to as immaterial.

Overruled.

Exception by defendant.

A. The condition of the balance of the $540,000 of death

losses was, $75,000 of them no proofs whatever had been received; in connection with the other $63,000, the papers had not been completed. These claims were in process of adjustment.

Q. On March 31, 1910, it appears from what you have just testified to that there was an unpaid balance of death losses of which proofs had been received and which had been approved by the company of $201,666.67; is that not correct?

A. That is correct.

Q. At that time the company had on deposit in banks a cash balance in the mortuary fund of $168,473.58; is that not correct? I refer to March 31, 1910.

A. It is.

Q. (p. 68.) It is true, then, that of the death losses for which call 127 was levied, $318,919.95 was included in and was a part of the $402,000 for which proofs had been received and which had been approved by the company; that is correct, is it not?

A. It is.

Q. If I am correct in my figuring, it appears, then, that $83,080.05 of the total amount of approved death losses which you have stated to have been $402,000, was not assessed for in your call 127?

A. That is right.

Q. (p. 69.) On March 31, 1910, you have stated unassessed death losses amounted to $540,000?

A. That is right.

Q. But you reported to the policy holders the death losses amounted only to $323,919.95; that is, in sending out notice of this call 127 you included notice of death losses amounting to that sum only and did not report to them the balance of the death losses which were then really unasssessed for; is that not so?

A. We reported to them in the list of death claims which accompanied the notice of that call only the death losses which were included in that call which amounted to $323,919.95. The balance of this was assessed for at a subsequent date and the policy holders were given notice of the deaths with the notice of the assessment which it included.

Q. (p. 104) This morning you were asked by Mr. Holman whether if you took the $168,000 plus, on hand in the mortuary fund March 31, 1910, and applied it as far as it would go to the $201,666.67 of approved death claims, whether the balance of approved death claims then left on hand would have been only $33,193.09, and your answer was that that was so. What would have been the balance of the outstanding unpaid death claims on that date which were then reported to the company?

A. $138,000.

Q. Those death claims aggregating $138,000 had not been formally approved?

A. They had not.

Mr. Durment then offered the following:

Q. (p. 68) Why did you not include that $83,000 in your call 127 when it appears that proofs had been furnished, that is, claims to that amount had been approved by the officers of the company?

Objected to by Mr. Holman as calling for a conclusion, as not cross-examination and as immaterial.

Overruled.

A. The mortality in any class of insured lives varies from period to period. For a long period we would get an average mortality in the class, but for short periods the mortality would vary. In one quarter there might be a very high mortality and in the next quarter a very low mortality. In the case of some few calls in the past the officers of the company in their best judgment, for the best interest of the certificate-holders, carried over some death claims from one quarter into the next quarter, where there has been a heavy mortality in the quarter, to make the assessments as nearly uniform as possible. If one assessment is $15, by reason of a low mortality, and the next assessment was $40 by reason of a high mortality, the lack of uniformity in amount might work a hardship on a great many of the members and necessitate their dropping their insurance.

Q. Did you pursue the same policy in levying prior assessments and in levying subsequent assessments that you have just referred to, prior and subsequent to 127?

A. I said that it had been done in some few cases where conditions seemed to warrant the officers in doing so, in their best judgment.

Q. (p. 70.) There was over $200,000 of death losses that were unassessed for on March 31, 1910, that were not included in Call 127 and that you kept back for subsequent calls; is that not so?

A. Of the $540,000 of death losses unassessed for on March 31, 1910, $216,080.75 was not included in call 127.

Q. (p. 105) State whether or not they represented deaths which had occurred, notice of which had been given, and whether or not in many instances the only thing that was lacking was the formal approval for payment.

A. That amount does represent unpaid death losses on that date which had actually occurred and for which the company had received notice, and in many cases the only thing lacking was the company's formal approval.

Q. Now, deaths occur, of course, from day to day?

A. They do.

Q. And notices of such deaths come in to you from day to day?

A. They do.

Q. And the approval to which you refer consists of an affidavit made by the beneficiary and attending physician, undertaker and possibly a near friend, the purpose of which form of affidavit is to assure the company that the member is actually dead; is that not right?

A. That is right.

Q. And when you say that claims were not approved, or that claims were in process of adjustment, you mean that the formal approvals either have not been furnished or have not been completed or, if completed, there are some mistakes, errors or omissions which are from time to time required to be supplied by the claimant; is that right?

A. That is right.

Q. And those death claims then on hand on March 31st in addition to the $33,000 plus which had been approved were being approved day by day as those proofs were either furnished or completed?

A. They were.

Q. Please state when call 127, which was prepared on the conditions as they existed on March 31, 1910, and notice of which went out May 2, 1910, was begun to be received by the company.

A. About the 1st of June.

Q. And when would the bulk of that amount that would be paid on that call come into the coffers of the company?

A. Between the 1st and the 15th of June.

Q. Now, please state whether or not many of the claims included in the $402,000 which were approved on that date had already been approved for some days.

A. They undoubtedly had been approved, some of them for several days, fifteen or twenty days or a month, perhaps.

Q. So that part of the ninety days within which you are privileged to withhold payment had already expired as to these approved claims?

A. Yes.

Q. And as to those claims, as well as to the $138,000 of claims which had been formally approved, the death of the member had occurred and the notice of his death had been given necessarily some considerable time before that date?

A. Yes.

Q. Now, please state whether or not it has been the custom and practice of the company to make payment of death losses just as quickly as they could do, in the exercise of good business judgment, after the claim has been established, and to disregard the privilege contained in the policy to withhold payment for ninety days.

A. It has.

Mr. Holman: Following the last question, I want to offer this part of the deposition:

Q. Now, in answer to Mr. Holman's question on this same subject you said that on that day you assessed the membership for a total of $323,919.95 and that it was absolutely necessary to do so. Will you please explain fully why it was necessary to levy that assessment on that day and for that amount?

A. It was absolutely necessary to levy that assessment to replenish the mortuary fund so that the mortuary fund would be able to meet the demands which would be made upon it between that date and September 1st, which would be the next succeeding date on which a call would become due.

By Mr. Durment:

Q. That would be a period of how long?

A. That would be a period of five months from March 31st and three months from June 1st, the date that call 127 was due.

Q. And that results because your assessments are levied only quarterly?

A. Yes.

Q. And assessments have only been levied quarterly ever since the insured in this case became a member of the association?

A. They have always been levied quarterly since he became a member of the association.

Q. Go ahead with your explanation why it was necessary.

A. If we had depleted the mortuary fund by paying all of the balance of the approved claims outstanding on March 31st unless we had levied the assessment there would have been no money coming into that fund until September 1st. We had on March 31st outstanding death losses amounting to $138,000 over and above the approved claims. We would have had $138,000 of death losses if we had depleted the mortuary fund to pay all of the approved claims. Completed proofs of death on those were apt to come into the office every day and were coming in every day. It might be some of those claims would be approved because said papers were received on April 1st. Under the contract we would have been compelled to pay these claims ninety days from receipt of said proofs of death, which would have been on July 1st, and if there had been no money in the mortuary fund on that date those claims would not have been paid, the company would have defaulted in its payments and the Men's Division of the Safety Fund Department would have been wound up by the terms of the Trustee's contract. In addition to these death losses of $138,000 that would have been outstanding March 31st if the mortuary fund had been used to pay all the approved claims we received, we were sure to incur death losses in April and in May. We could not tell what those losses would be; we knew about what the average would be, and those losses coming in in April would probably be approved, and the ninety-day limitation expired on the majority before September 1st, and the same would be true in May. It

was therefore necessary to replenish the mortuary fund by that assessment as of March 31st, as otherwise the company could not have made its demands upon its mortuary fund.

Plaintiff rests.

Mr. Durment: We now renew our motion to dismiss.

Motion denied.

Exception by defendant.

Case opened on behalf of defendant by Mr. Durment.

Mr. Durment: We offer in evidence, your Honor, what is Ex. 1 to Mr. Lawrence's deposition; it is the charter of this company. This is a certified copy of it. (Marked at the trial Deft's. Ex. 7.)

I offer in evidence Ex. 8, certified copy of the judgment in the New Haven Superior Court.

Mr. Holman: That is objected to as incompetent, irrelevant and immaterial, no foundation laid; it appears from the papers that neither the plaintiff nor the insured was a party to the action; it appears from the paper offered that the cause of action there stated is not this cause of action.

The Court: What is the purpose of this?

Mr. Durment: The purpose is this, your Honor: This is a Connecticut corporation; it appears already in evidence, if not, we will show it by the deposition later, that this mortuary fund is kept in Connecticut, and our contention is that it is in the hands of this company, subject to a trust, to pay these claims, the claims against it; that the company has been carried into court in its own jurisdiction, where this fund is, in a lawsuit brought by a number of certificate holders against the defendant and others, to determine their right to the mortuary fund, and their rights and obligations under this contract, and these judgments have adjudicated and determined that matter, and this company is bound by them and bound to administer that fund in accordance therewith.

The Court: You mean they are Connecticut contracts and this is the law of Connecticut which is in this contract?

Mr. Durment: Not only that, but further than that, this is a suit here not for personal judgment against this defendant; this is a suit to recover $2,000 out of a certain fund. Now, that fund is maintained under the law of Connecticut and under Connecticut contracts and is located in Connecticut, and the trustee of this defendant company is in Connecticut, and the funds of this company are subject to the control of the Connecticut courts in respect to that.

The Court: This is not a decision of the court of last resort?

Mr. Holman: No, just a county court.

Mr. Durment: No, it is made in pursuance of its order.

Mr. Holman: Not order.

Mr. Durment: No, but there are certain features of it that are—It went to a court of appeals, a court of last resort, and the finding of the lower court was modified to some extent.

Mr. Holman: No, no, there was a demurrer to the complaint, and that demurrer was sustained by the court below, went up to the Supreme Court and the court below was reversed, it was sent back for trial, and it was then tried by the New Haven court, and this decision was rendered in the lower court and never went any higher.

Mr. Durment: But it is a court of competent jurisdiction which had jurisdiction of the fund and defendant.

Mr. Holman: That is disputed.

The Court: Well, do you want to be heard on that?

Mr. Holman: I do.

The Court: Well, I will hear you Monday morning.

Adjourned until Monday, November 25, 1912, at 10 A. M.

Mr. Durment: When court adjourned we had offered in evidence a certified copy of the decree and presented it to the Court, and before urging that I desire to offer in evidence from the general statutes of Connecticut the revision of 1902, in force July 1, 1902, the Constitution of the United States, and the Constitution of the State of Connecticut (published by the authority of the State, the Hartford Press is the publisher,) the case of Lockwood v. Brainerd & Co., 1902. From that I desire to offer Section 1 of Article V of the Connecticut Constitution.

Mr. Holman: Objected to as incompetent, irrelevant, immaterial and no foundation laid.

Mr. Durment: (Reading) "The judicial power of the state shall be vested in a supreme court of errors, a supreme court, and such inferior courts as the General Assembly shall, from time to time, ordain and establish; the powers and jurisdiction of which courts shall be defined by law."

And Sections 535 and 536 of the provision itself, on page 207 of this publication.

Mr. Holman: Same objection. All this testimony may be taken subject to my objection.

Mr. Durment: (Reading) "Section 535. All civil actions for equitable relief only, or for legal relief only, wherein the matter in demand exceeds $500 and does not exceed $1,000, and all civil actions for both equitable and legal relief, wherein the equitable and legal relief severally and distinctly demanded exceeds $500 and does not exceed $1,000, may be brought either to the superior court or to the court of common pleas, provided that said actions which are within the territorial jurisdiction of the district court of Waterbury may be brought either to that court or to the superior court."

"Section 536. All civil actions wherein the relief, legal or equitable, severally and distinctly demanded, exceeds $1,000, shall be brought to the superior court, but civil actions in Fairfield county, in which the relief is demanded, as aforesaid, exceeds $500 and does not exceed $2,000, including therein appeals from the doings of commissioners in insolvent estates, may be brought or taken to the superior court or to the court of common pleas."

Now, your Honor, in connection with these statutes that I have read, we renew our offer as to the decisions.

Mr. Holman: I renew the objection that I made on Friday afternoon to the offer of the judgment.

The Court: Just what is this decision?

After Mr. Durment's statement the Court said:

I don't think the question involved in that case was the question in this case. I don't think the decision in that case even settles the law of Connecticut in this case. I think the objection to this ought to be sustained, and I will sustain it.

Mr. Durment: An exception to the ruling, and among other reasons for it, I want it to appear in the record that it is (the ruling) in violation of Article IV, Section 1, of the Constitution of the United States requiring "full faith and credit," and also Article I, Section 10, which prohibits the state from making any law "impairing the obligation of contracts," and also the Fourteenth Amendment which prohibits depriving one of property without due process of law.

We offer in evidence Ex. 9, which is a certified copy of the decree of the Superior Court of New Haven county, Connecticut—judgment signed by Shumway.

Mr. Holman: Same objection to this offer as I made to the other. Same ruling and exception.

Mr. Durment: Now, one thing that I want to make clear—I suppose that probably Mr. Holman will be willing to admit that—and it is that this Safety Fund, Men's Division, was a separate and distinct thing from the Safety Fund, Women's Division.

The Court: Mr. Holman does not claim that this surplus in the mortuary fund, of which he has given evidence here, belongs to anything more or anything else than the Men's Division.

Mr. Holman: Men's Division, not the Women's Division at all.

The Court: You claim that, too?

Mr. Holman: Yes, both claim that.

The Court: Why can't it be admitted on the record then?

Mr. Durment: I claim, however, the right to show that the Women's Division is an entirely separate and distinct thing, under a separate and different contract, and has nothing whatever to do with the Men's Department, so-called, nor with this contract which we have offered in evidence, so there can

be no possible question both as to the fund and as to the making of assessments.

Mr. Holman: Why, I don't see why I can't admit that. I am willing to admit that this defendant had another department of insurance, known as the Woman's Division, and it had a policy in that department; it had a mortuary fund in that department; it had a safety fund in that department; and that that Women's Division was entirely separate and distinct from the Men's Division of the Safety Fund Department; that the two were in no way connected, and that all the evidence in this case up to this point relates wholly and entirely to the Men's Division and no portion to the Women's Division of the Safety Fund Department.

Mr. Durment: And that the Women's Division—

Mr. Holman: Was conducted separately—

Mr. Durment: And under a separate and distinct contract as to the Safety Fund—

Mr. Holman: Yes.

Mr. Durment: And with a different safety fund from the fund in evidence—

Mr. Holman: Yes, the two were not connected at all.

Q. Now, please proceed and state to us the amount of death losses incurred or theretofore unassessed for, then state the amount of death losses that were assessed for on call 127, and then state the amount of death claims unassessed for at that time, referring always, unless otherwise specified, to the Men's Division of the Safety Fund Department.

A. On March 31, 1910, there were incurred death losses which had not been previously assessed for, $540,000. Call No. 127 included death losses amounting to $323,919.95. Of the death losses incurred but theretofore unassessed for on March 31, 1910, there was $216,080.05 of death losses which were not included in Call 127.

Q. Now, of the $540,000 of death losses which had been incurred on March 31, 1910, which were up to that time unassessed for, had any portion of those been paid out of the mortuary fund of this association of the Men's Department?

A. Yes.

Q. How much?

A. $200,333.33.

Q. What was the amount of death losses theretofore incurred and theretofore unassessed for which were unpaid?

A. On March 31st there were unpaid death losses amounting to $339,666.67.

Q. What were the death losses which were incurred in the Men's Division of the Safety Fund Department subsequent to March 31st and between that date and April 30th?

A. $99,000.

Mr. Holman: I object to this as immaterial.

Overruled.

Exception by plaintiff.

Q. On April 30th, what was the balance of your mortuary fund of the Men's Division Safety Fund Department?

A. $89,371.87.

Q. Please state the death losses incurred or therefore unassessed for prior to the levying of Call No. 127 on April 30th?

A. $639,000.

Q. Now, call No. 127 went out immediately after April 30th, or on May 2nd, 1910?

A. It did.

Q. And the amount of death losses on which that call was based was $323,919.95?

A. It was.

Q. Now, what was the aggregate of death losses on hand which had been incurred but were then wholly unassessed for except as they were included in call No. 127?

A. $315.080.05.

Q. Of the death losses theretofore unassessed for, the aggregate of which you have stated was $639,000, you had paid prior to April 30, 1910, how much?

A. $303,333.33.

Q. And there was unpaid on that date how much?

A. $335,666.67.

Q. Now, of the death losses included in call No. 127, amounting to $323,919.95, you had paid on or prior to April 30th, how much?

A. $282,419.95.

Q. And the balance of death losses included in call 127 which were unpaid on that date amounted to about how much?

A. They amounted to $41,500.

Q. Now, Mr. Lawrence, the figures which you have just given us which relate respectively to March 31, 1910, and April 30, 1910, appear in the tabulation thereof which will be attached thereto marked Ex. 30?

A. They do.

Court here took a recess until 2 P. M.

Mr. Durment: We offer Ex. 11 in evidence.

Q. The Safety Fund of the Men's Division of the Safety Fund Department is in whose custody?

A. The Safety Fund is in the custody of the trustee of the fund, the Security Company of Hartford.

Q. And that trustee is located in the city of Hartford, state of Connecticut, and the fund maintained in the city of Hartford, state of Connecticut?

A. Yes.

Q. Now, the mortuary fund is a fund from which your death losses are paid, is it not?

A. It is.

Q. And who has the custody of that fund and the balance in that fund from time to time?

A. The Hartford Life Insurance Company.

Q. And it maintains that fund in the city of Hartford, state of Connecticut?

A. Yes, the money composing the fund is deposited in various banks.

Q. Now, when in these statements you have given the amount of mortuary balance, that indicates the amount of the mortuary fund which remains in your hands on those dates after you had paid out of there such death claims and other charges as were paid out of that fund?

A. Yes.

Q. And those balances on the several dates which you have given them represent all of the mortuary fund and the full amount of the mortuary fund then in the possession of the defendant company?

A. That is true.

Q. What was the monthly average rate of death losses in the association during the first six months of 1910?

A. Something a little over $100,000.

Q. What was the average of the four previous mortuary calls? I mean mortuary calls previous to No. 127?

A. About $315,000.

Q. Each call averaged about $315,000?

A. That is right.

Q. (p. 44) In your testimony yesterday you spoke about the assumption of lapse. You gave us the percentage which was assumed in the calculation of call 127. I wish you would explain briefly why there is any necessity of assuming a lapse on each call?

A. If we did not assume a lapse on each call we would raise on each assessment less than the amount assessed for.

Q. It is inevitable, is it not, that there should be some lapse on each call?

A. Absolutely so; our assessment is based on conditions as they existed two months prior to the day the assessment is due. It is absolutely inevitable that some members whose certificates were in force two months prior, before they came due would lapse and not pay that call, or die, or in some way be canceled.

Q. Either continue to live and refuse to pay, or die or in some way not pay their assessment?

A. That is right.

Q. (p. 58) What was the total amount of that assessment 127 as levied?

A. The assessment was $323,919.95.

Q. Was that the aggregate amount of the assessment?

A. That was the amount of the death claims for which we assessed.

Q. And you assessed against certificate holders that amount of money to cover those death losses?

A. Yes.

Q. You have stated in your examination in chief that the death losses on March 31, 1910, amounted to the sum of $540,000?

A. I did.

Q. (p. 61) From December 31, 1909, to March 31, 1910, was there not an extraordinary or unusual rate of mortality in the assessment department of your company?

A. During all of the year 1910, we had a higher mortality than we had experienced in the past in the Men's Division of the Safety Fund Department.

Q. What was the average amount of death losses per month during the year 1909?

A. About $100,000 a month; $100,000 to $115,000, running up some months as high as $140,000, but the average was somewhere around $115,000 a month.

Q. For the year 1909?

A. Yes.

Q. What was the average amount of death losses in this assessment department, monthly average, for the period from December 31, 1909, to March 31, 1910? To refresh your recollection, I think you stated yesterday that the monthly average of death losses during the first six months of 1910 was something over $100,000; that is correct, is it not?

A. It is.

Q. Now, during the whole of the year 1910 did the monthly average of death losses greatly exceed the sum of $100,000, or was it approximately that average during that year?

A. I will furnish you the actual death losses month by month for the year 1910.

Q. And the statement will be attached to the deposition as a part of your testimony?

A. I will furnish same.

Paper marked Ex. 46 and offered in evidence by plaintiff. (Ex. 13 on the trial.)

Q. (p. 66) At that time the company had on deposit in banks a cash balance in the mortuary fund of $168,473.58; is that not correct? I refer to March 31, 1910.

A. It is.

Q. That balance in the mortuary fund was subject to check by the officers of the company?

A. It was.

Q. And it was within the discretion of the officers of the company as to whether they would then use the whole or a portion of that mortuary balance in payment of a part of these unpaid death losses which had been approved on the 31st day of March, 1910?

A. It was in their best judgment as to the benefit of the membership to so use the mortuary balance that no claims

would come due by reason of the ninety days expiring before June 1st, the date when the next call would come in, with no money on hand, with no balance on hand in the mortuary fund to pay these claims.

Q. It appears to me that you have not answered the question as put to you. If the company, through its officers, in its best judgment at that time, that is, on March 31, 1910, or thereabouts had desired to pay a portion of this unpaid balance of death losses, amounting to $201,667.67, it could have done so by checking against the balance of the mortuary fund deposited in the banks; is that not so?

A. If it was their best judgment to do so, yes, sir.

Q. And whether that fund should be applied for that purpose depended altogether on the exercise of the judgment of the officers of the defendant corporation?

A. If it was their best judgment for that purpose depended altogether on the exercise of the judgment of the officers of the defendant corporation? Yes, the judgment of the officers of the defendant corporation being based on conditions as they then existed.

Q. (p. 111) Please state what is the paper I now hand you and which will be marked Ex. 51?

A. That is a statement, year by year, from 1880 to March 31, 1910, of the amounts received from mortality calls in the mortuary fund, and of the amount paid for death losses from that fund. The first column shows the year, the second the amount received during the year from mortality calls in the mortuary fund, and the third column the amount paid during the year from the mortuary fund for death losses.

Q. And covers a period from the inception of that fund down to and including March 31, 1910?

A. It does.

Mr. Durment: Now, we offer in evidence Ex. 51 in the deposition. (Deft's. Ex. 14 on the trial.)

Ex. 2 of this deposition, which is the application on which this certificate was issued, we offer in evidence. (Deft's. Ex. 15 on the trial.)

The defendant here rested.

The plaintiff also rested.

Mr. Durment: At this time we desire to enter a motion that the Court direct a verdict for the defendant. I would like to be heard on that before the Court rules on it.

Mr. Holman: And the plaintiff moves the Court that the Court direct a verdict in favor of the plaintiff in this action for the amount claimed, and I would like to be heard on that, too, if there is anything more to be heard about.

The Court: I don't think there is anything for the jury in this case. The evidence is all admitted here, nobody dis-

putes anything that the other side has said, it is practically an undisputed state of facts. It raises the question as to the proper construction of the contract, and whether or not the conduct of the company in reference to the accumulation of this surplus, the way they handled it, particularly in enforcing that same old rule in reference to the assumed percentage for lapsation—

Mr. Haid: Not the same rule, if your Honor please.

The Court: Well, the same principle, of course, not the same identical rule, but the same principle—of taking the last average; and also whether or not using that amount of this assessment as a fund to meet death losses which occurred subsequent to the assessment for which this was not assessed shows such a technical deviation from the rule of the policy as to make this assessment illegal in the sense that it ought not to be used as a basis of a forfeiture.

Mr. Haid: And that, your Honor rules, is a question of law in this case?

The Court: That is a question of law under all the evidence in this case.

Mr. Holman: Mr. Durment, may I ask you this question: If your motion for a directed verdict should be denied, do you claim there is anything for the jury to consider in this case?

The Court: Well, I don't think there is.

Mr. Durment: Well, I don't know.

The Court: I think we would be practically asking the jury to decide a question of law, to take this contract and to construe it and say whether or not the contract had been in accordance with the rules provided by the contract. If I had thought there was any question for the jury to pass on in this case, I would have to deny both motions. All there is in this case is the evidence here showing this surplus and the manner in which it was accumulated, and then the defendant has come in and it has offered evidence explaining how they got that and what they used it for and endeavored to show that that was not a deviation from the rule of the contract and was reasonable under the circumstances. There isn't any dispute about the evidence in this case, no issues under the evidence. What inferences are to be drawn from it, it seems to me, are purely a question of law. If the defendant is right in his contention he ought to have a verdict, and if the plaintiff is right, she ought to have a verdict.

Mr. Durment: Now, my first basis of the motion is the fact that there was clearly and beyond any question of doubt in this case a default in payment of dues, which in itself alone was sufficient to forfeit this policy. Not only do we claim that on the evidence as it stands, regardless of any other reasons I have mentioned specially why it should be granted, there are some special reasons in addition that your Honor

cannot deny without coming in conflict with that section of the United States Constitution which forbids the state to make any law impairing the obligation of the contract, and the Fourteenth Amendment, which may not deprive one of his property without due process of law.

After argument by Mr. Holman on behalf of plaintiff, Mr. Durment said:

Mr. Durment: One of my grounds is that it appears from the evidence in this case that this Court has no jurisdiction to render a judgment against this defendant for this money, that it is wholly within the jurisdiction of the state of Connecticut to enforce payment out of a fund that is in the possession of a corporation of the state of Connecticut, in the hands of one in Connecticut who holds it as trustee under a Connecticut contract and for payment out of a fund which is itself in Connecticut; it is entirely beyond the jurisdiction of this court to affect the fund.

The Court: It appears to me, from the uniform course of dealing which the defendant had with this deceased, Hermann Ibs, that they themselves interpreted their rights under the contract to mean that the death loss could only be paid out of the proceeds of an assessment based upon that loss. In every one of these notices in evidence it is specifically stated that the assessment is made, not for the purpose of replenishing the fund, but for the purpose of meeting certain specified claims named in a list accompanying the notice. That is their own interpretation of their rights under that contract in their dealings with Hermann Ibs, and in this notice they said they wanted this particular assessment to help pay 145 death losses, a list of which accompanied the notice. It appears, however, that a large portion of those already had been paid out of a surplus in the mortuary fund which arose by reason of past excessive assessments—that is, excessive in the sense that they had in some manner or other gotten more than they needed to meet the past losses assessed for. It appears that they only needed one hundred and twenty-four thousand and some odd hundred dollars to pay the remaining portion of these 145 losses, and that they still had $168,000 surplus, so that they would have paid all of these 145 losses, which this assessment was made to meet, without assessing for one penny; that instead of using the proceeds of the assessment in the manner in which they had always claimed in their dealings with Mr. Ibs, that they were going to use it, that they had the right to use it under the policy, instead of using it according to their own interpretation of their rights under the policy—which they had used in all their dealings with Mr. Ibs—as a matter of fact they were using it to pay some death claims for which no assessment had been made and holding it to meet some that they expected might come later. It seems

to me that under those circumstances it was such a deviation from their rights under the policy, as they themselves had interpreted it, as made this assessment illegal when it is sought to base a forfeiture upon the non-payment of that assessment. So, gentlemen, as I view this case, I think I am compelled under the law to direct you to return a verdict in favor of Mrs. Ibs, the plaintiff in this case, for the $2,000 with interest at six per cent since the 31st day of August, 1910.

Mr. Durment: I want it to appear in the record that we claim that this verdict should be directed, if at all, in that amount to be paid out of the mortuary fund and not as a personal claim. We ask the Court that the verdict should not be a general verdict, payable as against the defendant, but out of this particular fund.

Mr. Holman: Oh, no!

Mr. Durment: Well, I put that in the record, and we insist it is all right.

The Court: All right, put it in the record, but I am going to direct a verdict against the defendant for that much money. I refuse that request and direct a general verdict.

Mr. Durment: An exception to the general verdict. And we also except to your Honor's directing a verdict and to your Honor's denial of our motion, upon the grounds we have specifically stated, as well as other grounds. It is in violation of the Constitution of the United States for the various reasons we suggested, and it is a case in which the Court has no jurisdiction to try and determine this matter and not in accordance with the evidence.

The Court: Let the record show that at first the defendant's motion is denied and the plaintiff's motion is granted.

Mr. Holman: It amounts to $2,268.32.

Mr. Durment: We will agree that the amount is correct if they are entitled to have a verdict.

A verdict was returned by the jury in favor of the plaintiff in the sum of $2,268.32.

A stay of forty days was granted.

PLAINTIFF'S EXHIBIT A.

No. 70627 Age 45

THE
HARTFORD LIFE AND ANNUITY
INSURANCE COMPANY.
HARTFORD, CONNECTICUT.

Certificate of Membership. Safety Fund Department. Maximum Indemnity $

IN CONSIDERATION of the representations, agreements, and warranties made in the application herefor, and of the

Admission Fee paid; and of the sum of ten dollars, on each $1,000 of the Maximum Indemnity herein provided for, to be paid to said Company as herein required, to create a Safety Fund as hereinafter described, and of three dollars per annum on each $1,000 for expense Dues, to be paid as hereinafter conditioned, and of the further payment of all Assessments proportioned to the Maximum Indemnity herein provided for, levied against the herein named member to form a Mortuary Fund for the payment of all Indemnity matured by deaths of members, with assessments, to be levied upon all the members in the department wherein this Certificate is issued whose Certificates are in force at the dates of such deaths, shall be made according to the table of graduated assessment ratios given hereon, as further determined by their respective ages and aggregate Maximum Indemnity at the dates of such deaths, with due allowance for discontinuance of membership, does hereby issue this Certificate of Membership in its Safety Fund Department to Hermann Ibs (herein called the Member) of St. Paul, County of Ramsey, State of Minnesota, with the following agreements:—

That ninety days from the receipt by the President or Secretary of said Company of satisfactory proofs, together with full information as to the manner and cause, of the death of the herein named member while this certificate is in force, all the conditions hereof having been conformed to by the member, there shall be due and payable, out of the aforesaid Mortuary Fund and not otherwise, the Maximum Indemnity of two thousand dollars (less the balance unpaid, if any, of the stipulated contribution to said Safety Fund, with fifty per cent added, together with any balance due said Company,) to his wife, Eliza Ibs, if living, otherwise to his legal representatives, upon presentation and surrender of this Certificate properly receipted. All such payments to be made at the Home Office of said Company in lawful money of the United States.

That said Company will deposit said sum of Ten Dollars, when received, with the Trustee, named in a contract made with it (of which a copy is printed hereon), as a Safety Fund in trust for the uses and purposes expressed in said contract; and shall at the expiration of five years from July 1, 1879, if said Safety Fund shall then amount to Three Hundred Thousand Dollars, or whatever thereafter said sum shall be attained, make a semi-annual division of the net interest received therefrom by it, pro rata among all the holders of Certificates in force in said Department at such times, who shall have contributed five years prior to the date of any such division their stipulated proportion of said Fund, by applying the same to the payment of their future dues and assessments; and that, whenever said Fund shall amount to One Million Dollars, all subsequent receipts therefor shall be divided by the said Company in like manner as the interest. Said Company fur-

ther agrees that if at any time, after said Fund shall have amounted to Three Hundred Thousand Dollars, or after five years from January 1, 1880, if that amount shall not have been attained before that date, it shall fail by reason of insufficient membership, or, shall neglect if justly and legally due, to pay the Maximum Indemnity provided for by the terms of any Certificate issued in said Department, and such Certificate shall be presented for payment to said Trustee by the legal holder thereof, accompanied by satisfactory evidence, as hereinafter provided, of its failure to pay, after demand upon it within the time herein stipulated for limitation of action, then it shall be the duty of said Trustee to at once convert said Safety Fund into money and divide the same (less the reasonable charges and expenses for the management and control of said Fund,) among all the holders of Certificates then in force in said Department, or their legal representatives, in the proportion which the amount of each of their Certificates shall bear to the amount of the whole number of such Certificates in force; and that in such event it shall file with Trustee a correct list, under oath, of the names, residences and amounts of the Certificates of all members entitled to participate in such division. The evidence referred to above to be either certification by said Insurance Company's President or Secretary that a claim is justly and legally due and that payment thereon has been demanded and refused, or the duly attested copy of a final judgment obtained thereupon in any court of competent jurisdiction, satisfaction of which has been neglected or refused for the period of sixty days from its date. And said Company further agrees that so long as any Certificate of Membership in its Safety Fund Department shall remain in force, said Fund shall be in nowise chargeable or liable for any use or purpose except as above mentioned.

And said Company further agrees that the aforesaid Mortuary Fund shall be in no wise chargeable or liable for any use or purposes other than for the settlement of Death Claims, except as herein mentioned.

THIS CERTIFICATE IS ISSUED BY THE COMPANY AND ACCEPTED BY THE MEMBER UPON THE EXPRESS CONDITIONS AND AGREEMENTS GIVEN ELSEWHERE HEREON, AND ASSENTED TO AS FORMING PART OF THIS CONTRACT.

IN WITNESS WHEREOF, The said Hartford Life and Annuity Insurance Company have, by their President and Secretary, signed and delivered this contract, at Hartford, Conn., this 4th day of April, one thousand eight hundred and eighty-five.

F. R. FOSTER, President.
STEPHEN BALL, Secretary.

(Seal Hartford Life & Annuity Insurance Co. Hartford, Conn.)

THIS CERTIFICATE IS ISSUED BY THE COMPANY AND ACCEPTED BY THE MEMBER UPON THE FOLLOWING EXPRESS CONDITIONS AND AGREEMENTS:

1. *Application Made Part of Contract.*—The application on the faith of which this Certificate issues is hereby referred to and made part of this contract; and the member hereby agrees that the answers and statements therein contained are material and that they are full, complete and true; that he has verified them and adopts as his own, each statement, representation and answer made therein, whether written by him or not; and that statements made to agent not therein written shall form no part of this contract.

2. *Of Payments.*—The member agrees to pay to said Company Dues of Three Dollars per annum on each $1,000 Indemnity, for expenses, on the first day of the month after date of issue hereof, and at every anniversary thereafter so long as this Certificate shall remain in force; or by monthly or other pro rata installments of the same in advance for periods of less than a year. And also agrees to pay said Company, upon all Certificates that shall mature by death, within thirty days from day on which notices bear date, all Assessments determined as within set forth; the proceeds of which, after deducting ten cents on each Assessment for cost of collection, shall form said Mortuary Fund. And further agrees to pay said Company the sum of Ten Dollars on each $1,000, as above, towards said Safety Fund, in a single payment, within sixty days from date hereof; but if not so paid, then by equal installments thereof, monthly, during the first year of membership, commencing sixty days from date hereof: In default of which payments towards the Safety Fund, said Company may for this purpose increase said Assessments by amounts equal to any such due and unpaid installments; and, while the whole or any portion of such required payment shall remain unpaid, said Company may apply toward payment thereof any unapplied sum standing to the credit of this Certificate. All such payments to be made direct to the Home Office of said Company, and not to agents, who are unauthorized to receive such payments.

3. *Conditions of Acceptance.*—The member further agrees and accepts this Certificate upon the express condition that if either the Annual Dues, Assessments or Safety Fund Deposit, as hereinbefore required, are not paid to said Company on the day due, then this Certificate shall be null and void, and of no effect, and no person shall be entitled to damages or the recovery of any moneys paid for protection while the Certificate was in force, either from said Company or the Trustee of the Safety Fund; and that if a legal and just claim to benefit, under the terms of this Certificate, shall arise before said Safety Fund shall have accumulated to Three Hundred Thousand

Dollars, or before January 1, 1885, and the sum collected on the assessments made on account of such event shall be paid over, as hereinbefore stipulated; or if such claim shall arise after said Fund shall have accumulated to said amount, or after January 1, 1885, and this Certificate be fully settled and surrendered; or if any final decision from said Safety Fund, as hereinbefore provided, shall be made by the Trustee thereof on account of this Certificate, then, in all such cases, all liability of said Company and of its Safety Fund, on account of this Certificate, shall cease.

4. *Giving Notice.*—A printed or written notice directed to the address of the member, as it appears at the time on the books of the Company, and deposited in the post office at Hartford, or delivered by an agent of the Company, shall be deemed a legal and sufficient notice for all purposes hereof. A transcript of the books of said Company, certified by the Secretary, showing such facts, shall be taken and accepted as conclusive evidence of the mailing of such notice, and of the facts aforesaid, as set forth in such transcript. Notices given to the member while any payment that has fallen due hereon shall be unpaid, are to be understood only as notices to reinstate membership and shall not be held to extend maturity of such unpaid payments, nor as waiving proof that the member is alive and in good health, proof of which to the satisfaction of the Company shall be tendered with all payments for reinstatement, nor shall such payments be effective to reinstate membership unless they shall be received at the Company's Home Office anterior to the member's death.

TABLE

Of Graduated Assessment Ratios for every $1,000 of Death Loss, on each $1,000 of a Total Indemnity in Force of $1,000,000.

Age.	Rate.	Age.	Rate.	Age.	Rate.	Age.	Rate.
15 to 21	$0.65	33	$0.91	44	$1.20	55	$1.92
22	.67	34	.94	45	1.22	56	2.03
23	.69	35	.97	46	1.25	57	2.15
24	.71	36	1.00	47	1.30	58	2.32
25	.73	37	1.03	48	1.35	59	2.50
26	.75	38	1.06	49	1.40	60	2.68
27	.77	39	1.09	50	1.47	61	2.86
28	.79	40	1.12	51	1.54	62	3.08
29	.81	41	1.14	52	1.63	63	3.30
30	.83	42	1.16	53	1.72	64	3.65
31	.85	43	1.18	54	1.81	65	4.00
32	.88						

These ratios decrease in proportion as the total indemnity in force increases above $1,000,000 in amount; and are calculated so as to cover the stipulated cost of collection.

PLFF'S. EX. B.

Identical with Plff's. Ex. D, except that it is not stamped "Second Notice" and "Registration Fee $.50."

PLFF'S. EX. C.

HARTFORD LIFE
INSURANCE COMPANY
HARTFORD, CONN.

REGISTERED LETTER NOTICE.

June 9" 1910.

You are hereby notified that Quarterly Call No. 127, on Policy No. 2-70627, notice of which was mailed you MAY 2, 1910, and duplicate of which is enclosed herewith, has not been paid.

Unless the amount of $35.95, the amount due on said Quarterly Call, including FIFTY CENTS FOR THIS NOTICE, is received at this office on or before *JUNE 20, 1910, your policy will be cancelled.

GEO. E. KENNEY,
President.

*June 30th, if residence is on or west of the meridian of Salt Lake, Utah.

Form 0261.

PLFF'S. EX. D.

SPECIAL NOTICE OF QUARTERLY CALL NO. 127.

Your next Quarterly Call will fall due and be payable Sept. 1, 1910.

HARTFORD LIFE INSURANCE COMPANY,
Hartford, Conn. May 2, 1910.
SECOND NOTICE.

Hermann Ibs
105 Central Ave.,
St. Paul, Minn.

2-70627

This Call, which will be due June 1st, 1910, is made to meet 145 Deaths (as shown by accompanying list), Benefits, $23,919.95 and expenses on your policy, as follows:

For Mortality Call,	$33.95
" Quarterly Dues to Sept. next,	1.50
Credit,	$.....
Amount Due,	$35.45
Registration Fee,	.50

Payment will not be accepted later than June 5, 1910, unless residence is on or west of the meridian of Salt Lake, Utah, in which case payment will be accepted up to and including June 15, 1910.

Unless the payment called for by this notice shall be paid to the Company at its Home Office by or before the day it falls due the policy and all payments thereon will become forfeited and void.

Return this notice with remittance payable to

HARTFORD LIFE INSURANCE COMPANY.

Make all remittances by Draft, Check, P. O. or Express Money Order when possible. Letters containing currency must be registered.

See over for Special Notice.

SPECIAL NOTICE.

If the payment of the above Quarterly Call is not received at this office on or before *June 5, 1910, the last day allowed for payment in the above notice, a second notice will be mailed to the policy holder by registered letter, giving until *June 20, 1910, to remit, and the same charge will be made for this second notice as is fixed by the law of Massachusetts, namely, fifty cents.

Every member whose payment does not reach this office on or before *June 5, 1910, will be obliged to pay this fifty cent fee in order to have the policy unconditionally reinstated.

After *June 20, 1910, the limit allowed for payment under the registered notice, the Company reserves the right to require a medical examination as a condition of re-instatement.

*If residence is on or west of the meridian of Salt Lake, Utah, ten days additional time is allowed.

PLFF'S. EX. E.

THE HARTFORD LIFE INSURANCE COMPANY.

The following members having died, the claims of their beneficiaries are included in the regular quarterly Call, No. 127, notice of which accompanies this list.

Members.	Location.	Date of Death.	Amt.

PLFF'S. EX. H-1.

Your next Quarterly Call will fall due and be payable JUNE 1, 1900.

SPECIAL NOTICE OF QUARTERLY CALL NO. 86. HARTFORD LIFE INSURANCE COMPANY, HARTFORD, CONN., JANUARY 30th, 1900.

This Call is made to meet 100 Deaths as shown by accompanying list, Benefits, $349,000, and expenses as shown below, on your policy which will be due MAR. 1, 1900.

For Mortality Call,		$15.30
" Quarterly Dues to June next,		1.50
" Safety Fund,		
Credit,	$.....	$16.80
Dividend; To be applied if payment be made,		1.00
Amount Due,		$15.80

Stamped:
"Paid Feb. 26, 1900.
Hartford Life Insurance Co.
R. B. Parker,
Treasurer.

Herman Ibs,
105 Martin St.,
St. Paul, Minn.
2-70627

Payment will not be accepted later than MAR. 5, 1900, unless residence is on or west of the meridian of Salt Lake, Utah, in which case payment will be accepted up to and including MAR. 15, 1900.

Unless the payment called for by this notice shall be paid to the Company at its Home Office by or before the day it falls due the policy and all payments thereon will become forfeited and void.

Return this notice with remittance payable to

HARTFORD LIFE INSURANCE COMPANY,

Make all remittances by Draft, Check, P. O. or Express Money Order when possible. Letters containing currency must be registered.

SPECIAL NOTICE.

If payment of the above Quarterly Call is not received at this office on or before *Mar. 5, 1900, the last day allowed for payment in the above notice, a second notice will be mailed to the policy holder by registered letter, giving until *Mar. 20, 1900, to remit, and the same charge will be made for this second notice as is fixed by the law of Massachusetts, namely, fifty cents.

Every member whose payment does not reach this office on or before *Mar. 5, 1900, will be obliged to pay this fifty cent fee in order to have the policy unconditionally reinstated.

After *Mar. 20, 1900, the limit allowed for payment under the registered notice, the Company reserves the right to require a medical examination as a condition of reinstatement.

*If residence is on or west of the meridian of Salt Lake, Utah, ten days additional time is allowed.

Plaintiff's Exhibits H-2 to H-39 being Calls 87 to 126, inclusive, are copies of Ex. H-1, except as to dates and amounts.

PLFF'S. EXHIBIT I.

St. Paul, Minn., June 29, 1910.

Hartford Life and Annuity Ins. Co.,
Hartford, Conn.

I enclose money order of $35.95 in payment of assessment on Policy No. 70627, issued by your Co. to Herman Ibs.

Yours,

MRS. HERMAN IBS.

Herman Ibs,
105 Central Avenue,
St. Paul, Minn.

PLFF'S. EXHIBIT J.

(On letter head of Hartford Life Insurance Company.)

Hartford, Connecticut, July 1st, 1910.

Mr. Herman Ibs,
105 Central Ave.,
St. Paul, Minn.

Dear Sir:

We are in receipt of remittance in payment of Call due June 1st, 1910, on Certificate No. 70627 on the life of Herman Ibs. As this Policy has already lapsed for non-payment of the Call mentioned above, and been canceled according to its terms, it can only be reinstated upon furnishing the Company with satisfactory evidence of the insurability of the member without expense to the Company. The cost of reinstatement is $1.00. Upon receipt of a remittance for this amount, we will forward the necessary papers for applying for reinstatement. In the meantime, we hold the remittance unused, as the Certificate has lapsed and been canceled.

Very truly yours,

T. F. LAWRENCE,
Secretary.

R

PLFF'S. EXHIBIT K.

St. Paul, Minn., Aug. 22, 1910.

Hartford Life Insurance Co.,
Hartford, Conn.

Dear Sirs:

On April the 4th, 1885, your company issued to Hermann Ibs of St. Paul, Minnesota, a policy of Life Insurance in the sum of $2,000.00, payable to Eliza Ibs, the wife of the insured. Mr. Ibs died on June the 27th last, and the beneficiary has employed me to collect the amount of the policy.

Will you kindly forward to me the necessary blanks so that I may submit proof of death of the insured as required by the regulations of your Company?

Yours respectfully,

O. E. HOLMAN.

PLFF'S. EXHIBIT L.

Hartford Life Insurance Co.
Hartford, Conn.
T. F. Lawrence, Secretary.

August 31st, 1910.

Mr. O. E. Holman,
Attorney at Law,
No. 410-414 Globe Bldg.,
St. Paul, Minn.

Dear Sir:

We have before us your favor of the 22nd inst., referring to Certificate No. 70627, issued by this Company on the life of Hermann Ibs, and have to state in reply that this Certificate lapsed for non-payment of the call due June 1st, 1910, and was then canceled in accordance with its terms. The Certificate provided for the forwarding of a notice thirty days in advance of the date the assessment was due and further that if payment was not made on the date due, the Certificate should be canceled and of no effect.

A notice of the call due June 1st was forwarded to the member at his address as it appeared on our books on the second day of May. The Company's rules allowed four days of grace or until June 5th. They further allowed an extension of fifteen days, or until June 20th, and a registered second notice—in accordance with the Company's rules—was forwarded to the member, advising him that payment had not been made by June 5th, and that he had until June 20th to pay it. The payment was not made on or before June 20th, and the Certificate was then canceled.

On June 29th a money order was mailed to us for the amount of the call and the $0.50 delinquent fee required by the Com-

pany's rules. This could not be accepted, the Certificate having been canceled, and the member was so notified. We notified him further that we could not accept it without satisfactory evidence of insurability without expense to the Company, and asked him to forward us $1.00, the fee for the medical examination, so that we could give him the necessary instructions for applying for reinstatement. To that letter we had no reply, and so, on July 29th, we returned by registered mail, the money order for $35.95, stating that the Certificate had been canceled and we therefore returned the Money Order. This was directed to Mr. Ibs at his address as it appeared on our books. It was returned here, however, undelivered.

As you are representing the beneficiary, we are handing you herewith the Money Order mentioned above. For your information we would state that this is a post-mortem assessment contract, carried at exact cost, the assessments made having covered only the stipulated deposit to the Safety Fund, dues as stipulated in the contract for expenses, and the member's share of the actual death losses incurred in the Men's Division of the Safety Fund Department of the Company. There is, therefore, no reserve and the contract was of no effect when lapsed. There is no liability on the part of the Company on account of this Certificate.

Yours very truly,

T. F. LAWRENCE,
Secretary.

1 enc.

DEFENDANT'S EXHIBIT 5 (Ex. 24 of Deposition).

HARTFORD LIFE INSURANCE CO.,
Hartford, Conn.

T. F. Lawrence, Secretary.

Registered Mail.
Return Receipt Demanded.
ICM

July 29th, 1910.

Mr. Herman Ibs,
No. 105 Central Ave.,
St. Paul, Minn.

Dear Sir:

Having received no reply to our letter of July 1st, we return herewith a Money Order for $35.95, which you forwarded the Company to cover the call due June 1st on Certificate No. 70627 on your life. This settlement was made after the Certificate had lapsed, and consequently, could not be accepted without the Company being provided with a satisfactory application for reinstatement. The Certificate now has no value whatever.

As previously advised you, however, the Certificate may be placed in full force and effect providing you make settlement of the overdue call and make a satisfactory application for reinstatement without expense to the Company. If you wish to have the insurance placed in force, forward us a Money Order for $36.95, $35.95 to cover the call referred to above, and $1.00 to cover the cost of the necessary medical re-examination. We will then forward you the proper blanks to be used in making application for reinstatement with full instructions for having it executed.

Yours very truly,

T. F. LAWRENCE,
Secretary.

1 enc.

DEFENDANT'S EXHIBIT 8.

New Haven County, Superior Court, March 23, 1910.

Charles H. Dresser of Hartford, Connecticut; Wilbur H. Squire of Meriden, Connecitcut; Hugh J. Wiley of New Haven, Connecticut; F. L. Perdue of Terre Haute, Indiana; E. W. Amsden of Ormond, Florida; R. H. Davidson of Ballston Spa, New York; H. McClary of Southington, Connecticut; R. N. Stanley of Highland Park, Connecticut; A. J. Bostwick of Sharon, Connecticut; Charles Donnelly of Covington, Kentucky; Joseph Bradford of Norwich, Connecticut; William H. Adams of Worcester, Massachusetts; Henry A. Weber of Detroit, Michigan; W. J. M. Gordon of Cincinnati, Ohio; W. C. Van Loon of Cincinnati, Ohio; C. A. Roebuck of Williamstown, Massachusetts; O. S. Chapman of Minneapolis, Minn.; J. M. Bugg of Chipley, Georgia; Charles Ammen of New Orleans, Louisiana; Adolph Schmidt of Brooklyn, New York; A. B. Smith of Morristown, Vermont; William Booth of Clinton, Illinois; W. A. Oldham of Springfield, Missouri; C. H. Robinson of St. Paul, Minnesota; Porter Farley of Rochester, New York; Herbert Myrick of Springfield, Massachusetts; A. B. Stockwell of Windsor Locks, Connecticut; W. L. Dodds of Buffalo, New York; O. W. Kerner of Kernersville, North Carolina;

v.

The Hartford Life Insurance Company of Hartford, Connecticut; Security Company of Hartford, Connecticut; George E. Keeney of Somersville, Connecticut; Lewis Sperry of East Windsor Hill, Connecticut; Rienzi B. Parker of Hartford, Connecticut; Lewis E. Gordon of Hartford, Connecticut; Everett J. Lake of Hartford, Connecticut; James H. Knight of Hartford, Connecticut; Raymond G. Keeney of Hartford, Connecticut; and Andrew Gordon of Hazardville, Connecticut.

JUDGMENT.

This action was brought by the plaintiffs in their own behalf and for the benefit of other creditors and certificate holders in similar situation as themselves against the defendants named in the complaint, claiming that prior to 1880 there had been invented a plan of assessment life insurance which was designated as the Safety Fund Plan, and published and generally known under that name, the principal features of which plan are described as follows: Each person applying for insurance under the plan was to pay an admission fee of $8 for $1,000; $12 for $2,000; $15 for $3,000; $18 for $4,000; $20 for $5,000 and $40 for $10,000, and a medical examination fee estimated at $3, which medical examination fee was to be paid to the physician; also to pay annually, for the sole purpose of paying the expense of said insurance on said Safety Fund Plan, $3 for each $1,000 of insurance, also to pay as mortuary payments or assessments to meet death losses an amount graduated according to the policy-holder's age, when the assessment was made, the amount of his policy, and the total amount of insurance or indemnity in force with the company. Furthermore, each member was to pay $10 on each $1,000 of his insurance to make up a "Safety Fund." This Safety Fund was to be deposited with the defendant, The Security Company of Hartford, Connecticut, as trustee. As often as the receipts for said fund amounted to a sufficient sum to purchase $1,000 par value of United States bonds, such trustee was to make investments of such funds therein and register the same in its name as trustee of the Safety Fund of said insurance company. The earnings of this Safety Fund after it reached $300,000, and all contributions to said fund after it reached $1,000,000 in United States bonds, par value, were to be divided up among the outstanding certificate holders whose certificates had been in force five years, in proportion to the face amount of their certificates. In case of failure of any certificate holder to make payments in accordance with his agreement, his interest in said Safety Fund and all his claims were to cease; and when the face amount of outstanding certificates was less than $1,000,000 it should be divided among the outstanding certificate holders in proportion to the face amount of their certificates. And further said sum was to belong absolutely to the certificate holders and the company was to have no interest whatsoever therein, except in its application for the benefit of the certificate holders in accordance with the terms of said plan. And claimed that at some time in the year 1880 the defendant, the Hartford Life Insurance Company, adopted said plan and issued certificates in accordance with the terms thereof; and that the plaintiffs and a large number of others held certificates issued in accordance therewith and similar to Exhibit "B" annexed to said complaint; and claimed that in pur-

suance of certain purposes for its own benefit said insurance company offered various inducements to induce the certificate holders in its Safety Fund department to surrender their certificates in said department and to take out in place thereof policies in the stock department of said company, and that said insurance company had diverted from the moneys and property of said Safety Fund department large sums of money to use and benefit of itself and the managers and stockholders of its stock department, and made other allegations, as will appear from said complaint, and asked relief as therein set forth. Said action came to this Court on the first Tuesday of November, A. D. 1906, and thence by continuance to the first Tuesday of January, 1907, when and where the parties appeared and were at issue on demurrers as on file, and the Court on the 11th day of October, 1907, sustained said demurrers and adjudged that the complaint was insufficient, and that the defendants recover the costs, and thereupon the plaintiffs appealed from said judgment to the Supreme Court of Errors, to be held at Bridgeport within and for the Third Judicial District on the fourth Tuesday of October, A. D. 1907, and said court, having heard said case, rendered judgment on June 9, 1908, finding error and overruling said demurrers in part and sustained said demurrers in part, and remanding said cause to this Court for further proceedings as will appear in said judgment; and thereupon the defendant, the Security Company, filed its answer as on file, and the other defendants filed their answers as on file, and the case was heard on the demurrer of plaintiffs to the answer of the Security Company, and the Court on the 17th day of December, 1908, rendered its decision sustaining the demurrers to the first, second and third defenses of said answer, and overruling the demurrer to the fourth defense; and the case thereupon came by regular continuance to this Court on the ? day of January, 1909, when the Court made an order that the issues raised by the 21st paragraph of the answer of the insurance company to the 29th paragraph of the complaint, and paragraph 10 of the plaintiffs' reply to said answer, be heard and determined before any other issues were tried, and thence said case came by regular continuance to the 27th day of May, A. D. 1909, when the parties were at issue as on file and thereupon a hearing was had on said issues, but the said The Security Company did not appear, and the Court (Judge Shumway presiding) after said hearing filed a memorandum of decision as on file under date of July 21, 1909, and on March 23, 1910, formally entered judgment as on file to conform to the date of this judgment; and thence said cause came to this Court on the 10th day of November, A. D. 1909, when all the parties duly appeared and were heard on the other issues in said case not disposed of by the aforesaid judgment, and the Court having heard the parties

finds certain issues in favor of the plaintiffs and certain others in favor of the respective defendants, as herein set forth, and at the request of the plaintiffs specially sets forth the facts upon which the judgment is founded as follows:

The Safety Fund plan of insurance under which the certificates in this case were issued, and with which they comply in terms, is substantially as follows: Each person applying for insurance under the plan was to pay an admission fee of $8 for $1,000; $12 for $2,000; $15 for $3,000; $18 for $4,000; $20 for $5,000; and $40 for $10,000, and a medical examination fee estimated at $3, which medical examination fee was to be paid to the physician; also to pay annually expense dues of three dollars for each $1,000 of insurance, also to pay as mortuary payments or assessments to meet death losses an amount graduated according to the policy holder's age, when the assessment was made, the amount of his policy, and the total amount of insurance or indemnity in force with the company. Furthermore, each member was to pay $10 on each $1,000 of his insurance to make up a Safety Fund. This Safety Fund was to be collected by the defendant, The Hartford Life Insurance Company, and by it deposited with the defendant, The Security Company of Hartford, Connecticut, as trustee. As often as the receipts for said fund amounted to a sufficient sum to purchase $1,000 par value of United States bonds, such trustee was to make investments of such funds therein and register the same in its name as trustee of the Safety Fund of said Insurance Company until said fund so invested would amount to one million dollars par value of United States bonds. The earnings of this Safety Fund after it reached $300,000 and all contributions to said fund after it reached $1,000,000 in United States bonds, par value, were to be paid over by said Security Company to said Insurance Company and by it be divided up among the outstanding certificate holders who had contributed five years prior to the date of any such division their stipulated proportion or payments to said fund, in proportion to the face value of their certificates.

In case of failure of any certificate holder to make payment in accordance with his agreement, his interest in said Safety Fund and all his claims thereon ceased. When the face amount of outstanding certificates becomes reduced by death, lapse or other cause to the amount of one million dollars, the disposition of said Safety Fund in such case was adjudicated by this Court in the judgment referred to above rendered by this Court, Judge Shumway presiding, as appears therein.

The Security Company and the Hartford Life Insurance Company on December 31, 1879, and before the Hartford Life Insurance Company commenced the issue of such certificates, executed an agreement, a copy of which is incorporated in each certificate and is found incorporated in Exhibit "B" in

this case, under which agreement the Security company assumed the management of the Safety Fund in accordance with the terms of the contract contained in the certificate, and with the plan as thus set forth, and continued the management of such business in accordance with the terms of the agreement down to a period in 1890.

At the solicitation and by the procurement of the Hartford Life Insurance Company, the Legislature of 1889 passed a private act, approved April 10, 1889, which is as follows:

"Resolved by this Assembly: That the Security Company, a corporation located in Hartford, be and it is hereby authorized to invest the funds known as the Safety Fund, which it now holds or may hereafter receive from the Hartford Life and Annuity Insurance Company, a corporation also located in said Hartford, under a contract between said companies dated the thirty-first day of December, 1879, in trust for the benefit and security of certain holders of certificates of membership in said Hartford Life and Annuity Insurance Company, in such other securities in addition to United States bonds as the life insurance companies of this state are by law authorized to invest in, instead of being compelled to invest all said funds in United States bonds, as specified in said contract; provided, such investments of said funds in other securities than United States bonds shall be made with the consent and approval of said Hartford Life and Annuity Insurance Company; and, provided further, that nothing in this resolution shall be so construed as in any way to vary, alter or change the purposes, conditions or stipulations of such trust as set forth in said contract, except as to the kind of securities in which the same may be invested."

Thereafter the Security Company did not comply with the provisions of the contract executed in December, 1879, in regard to investments. It never accumulated a fund of one million dollars, par value, of United States bonds, although it did accumulate a fund which in June, 1894, amounted to one million dollars value of securities. Relying in good faith on the provisions of this act of 1889 above quoted, in the year 1890, it sold United States bonds amounting to $501,000, par value, then held by it under the terms of said trust agreement and received therefor $97,366.85 over and above the par value thereof, which United States bonds had been purchased at a premium of $115,689.50, making the whole cost of the said bonds $616,689.50. Said Security Company thereupon, in accordance with the provisions of said act of 1889, but in violation of said contract with said certificate holders made in 1879, as aforesaid, invested the proceeds of such sale, together with other Safety Fund payments thereafter received, in such other securities as are required for the investment of insurance companies under the laws of this state, but not in United

States bonds, as provided in said agreement. The amount of money so received and invested, together with the premiums paid, including the premiums paid on the United States bonds so converted, amounted to much more than one million dollars, to-wit, upwards of $1,090,000.

Said act of 1889 above stated has been ruled by this Court on demurrer to the answer of the defendant, the Security Company, to be unconstitutional as impairing the obligation of the contract embodied in the trust agreement with the certificate holders.

As a result of such investments in other securities losses have been incurred, and the actual value of said fund now remaining in the hands of the Security Company on account of said Safety Fund is somewhat less than one million dollars. Many of said securities are not such as are authorized by the law of this state concerning the investments by trustees, as appears by the disclosure of the Security Company, on file in this case, and some of these securities have today no market value and are paying no income.

This Court, however, finds that the illegal investments made by the Security Company under the provisions of the private act of the General Assembly of 1889, were not made to further any purpose of its own, but were made in reliance upon said act which was passed in the supposed interest of the beneficiaries, or certificate holders; that such illegality differs from illegality knowingly or negligently indulged in; that the loss which has fallen upon the Security Company from such illegal investments of the Safety Fund has its source in misfortune and not in culpability.

By reason of the change so made in the investments of said Safety Fund, there was received as income by said Security Company down to the commencement of this action, $315,828.41 in excess of what the income would have been had said United States bonds not been sold and all investments of said Safety Fund had been made by the trustee only in United States bonds.

Practically the only issue of United States bonds in the market for sale from January, 1890, to March, 1895, were the four per cent bonds maturing April 1, 1907. The market price of said bonds in January, 1890, was 126½ of par, and the price thereof gradually fell from time to time until March, 1895, when a new issue was made of four per cent bonds to mature in 1925. The market price of said four per cent bonds of 1907 then ranged from 111 to 112¾ of par, and the market price of said four per cent bonds of 1925 ranged from 119⅛ to 120½. The Security Company was not required to establish a sinking fund. The agreement makes no reference to such a fund, although United States bonds were then (December, 1879) at a small premium of about three per cent.

The situation presented by the beneficiaries was not analogous to that of a life tenant and remainderman, but was more nearly like a beneficiary entitled to the interest, and eventually to the principal of a fund. It was as important for the early certificate holders to receive all the income as that a sinking fund should be established to lighten the possible burden that might fall on certificate holders at the maturity of the bonds, if the $10 payments then received were applied to the purchase of bonds to restore the Safety Fund to $1,000,000, par value, of United States bonds. A continuation of the business was then contemplated with a constant flow of $10 payments into the Security Company from the new certificate holders. By having no sinking fund, the total net income went to the beneficiaries instead of a part of it into an investment to await the maturity of the bonds, thus in effect the beneficiaries became the holders of a sinking fund, since if at maturity more than the $1,000,000 was necessary to procure $1,000,000 par value, of United States bonds, it would come from them in diminished returns from the $10 payments, or in case (as happened) the business was not continued, then equitably from diminished payments of income until the fund was restored. As a matter of fact, at the maturity of the bonds of 1907, United States bonds paying two per cent. could have been purchased nearly at par.

Under the investment policy pursued after 1889, a much larger sum arising from unused $10 payments was returned, and much earlier, to the use of certificate-holders, and also a much larger amount of income was so returned, than would have been returned if the investments had been made in United States bonds.

By the terms of said trust agreement above referred to, it appears that the Security Company agreed with the Hartford Life Insurance Company and with the certificate-holders, that "the necessary expenses connected with the management of said fund shall be limited to the ordinary commissions for purchasing or selling and transfer or transmission of the hereinafter mentioned bonds, together with the cost of the stationery and postage used in replying to requests for information of the condition of said fund, and the actual cost of any judicial action needed to determine the legal status of said fund. All other expenses to be included in and covered by such reasonable charges as shall be made for the compensation of the trusteeship, to be determined by the amount of time and labor involved in the execution thereof."

On the date of the execution of said trust agreement, the Security Company by its president and secretary wrote a letter to the president of the Insurance Company, and the same day the Insurance Company by its president and secretary wrote a similar letter to the president of the Security Company, in

both of which it was stated that it was agreed that the compensation referred to in said contract should be as follows: The rate to be one per cent. on all sums up to and not exceeding $200,000, but in no year to be less than $500.00; and from $200,000 to $400,000 to remain at $2,000 per annum; and on all amounts exceeding $400,000 to be one-half of one per cent. per annum."

This was done before any certificate of membership had been issued by the Insurance Company and before any opportunity had been had to determine the amount of time and labor involved in the execution of the trusteeship.

Thereafter, at the end of each six months, the Security Company computed its compensation under its interpretation of said agreement with the said Insurance Company, and submitted said compensation to said Insurance Company for its approval, and, if so approved, it withdrew said amount and took the same as its compensation as trustee for the preceding six months.

No complaint was ever made of this compensation by any certificate-holder down to the commencement of this suit, but it did not appear that the certificate-holders knew of the rate or amount of compensation which said trustee had received or was receiving.

The amount of income collected under said trust agreement by the Security Company was $970,175.83 down to September 18, 1908, and the Security Company, acting under its interpretation of the terms of said letter, received and credited to itself as compensation, with the consent of said Insurance Company, and deducted from said income, the amount of $116,741.16, being more than twelve per cent. of the income, and then paid over to the Insurance Company for credit on the assessments of the certificate-holders in accordance with the terms of the contract, the balance of the income after deducting its compensation and other expenses, the latter amounting in all to over fifteen thousand dollars.

Since 1892 the stated compensation of the trustee has been calculated and received on amounts which in each year exceeded one million dollars.

The ordinary compensation of a trustee for holding and managing trusts consisting of personal property is five per cent. of the income. Under the contract, the Security Company, down to March, 1899, in addition to taking care of and managing said Safety Fund, and turning over the income to the Hartford Life Insurance Company semi-annually, in pursuance of the contract, kept an account of the ten dollar payments with the names and addresses of the certificate-holders from whom said ten dollar payments were received. Since January 1, 1891, the fair value of the services of the trustee does not exceed eight per cent. of the gross income of the fund

for each year, but its charges for such services have largely exceeded that amount. The amount of such excess, together with simple interest thereon calculated from the close of each year, when such charge was made, amounts to $40,046.36.

And this Court further finds that said Security Company was not obligated under the terms of said trust agreement with the Hartford Life Insurance Company and with the certificate-holders, to maintain a sinking fund;

That the act of the General Assembly of 1889, to which reference is made above, was passed without notice to, or the consent of, the holders of certificates of insurance issued by said Insurance Company, and was unconstitutional and void; that if the Safety Fund is now invested in United States bonds an annual income of less than two per cent. will be received on the amount so invested, and that if said fund is now invested in securities (other than United States bonds) in which the law of this State authorizes trustees to invest trust funds, an approximate annual income of four per cent. will be received on the amount invested, and that it is within the power of this Court of Equity to protect the said certificate-holders from the great and unnecessary loss and waste of approximately twenty thousand dollars per year, which loss and waste will result if said Safety Fund is now invested in United States bonds.

It was claimed by the plaintiffs that the defendants were levying assessments unnecessary in amount and number for their own wrongful purposes. The Hartford Life Insurance Company levied the assessments provided for in the plan and in the certificate above set forth, quarterly, and the proceeds of such assessments when received by said Insurance Company were paid into and credited to the mortuary fund described in the contract of insurance. The Hartford Life Insurance Company did not levy assessments unnecessary in amount or number. It appeared, however, that the allowance made for discontinuance of membership, although made in good faith, often exceeded the actual amount necessary to cover the deficiency in payments arising from such discontinuances, and that from that source margins of excess of payment arose from time to time consisting of the difference between the aggregate amount actually received by said Insurance Company from such quarterly assessment and the amount needed to pay the losses for the corresponding quarterly period. It also appeared that although the Company in practice levied assessments to cover the full amount of the face value of the certificates for each death during the previous quarter, they deducted an actual payment from the face of such certificates a certain proportion of the assessment which would have been due from the certificate-holder had he survived the quarter, which sum is proportioned to the portion of such quarter which had elapsed at the time of the death of such certificate-holder, and there was,

therefore, a margin arising from this circumstance between the amount of the losses paid and the amount of the losses assessed for. These margins accumulated from time to time in the hands of the Hartford Life Insurance Company in its mortuary fund, have always been and are now in constant use in the prompt payment of losses in advance of the receipt of the moneys to pay the same from the regular assessments, by which receipts the said fund is constantly reimbursed. Said accumulation of margins, although in constant use are capable of exact determination in amount, and now amount to many thousands of dollars.

The plaintiffs claimed it was improper and wrongful to accumulate these margins and to carry this balance in said mortuary fund, and claimed that said balance of margins should be distributed among the outstanding certificate-holders, but it is held that it is proper and reasonable that the Company should hold some such fund for the purpose of enabling it to pay losses promptly, but it is not necessary for that purpose that the Company should hold more than the amount of one average quarterly assessment for the previous year.

Said fund belongs to the certificate-holders and is held in trust for them, and the Hartford Life Insurance Company has the right to hold the same, to the extent above stated, in trust for said certificate-holders and for application to the settlement of death claims, and said fund should be ultimately distributed in the settlement of death claims and as hereinafter provided, before said certificates in accordance with their provisions are extinguished and the Safety Fund distributed in accord with the judgment of this Court, Judge Shumway presiding, above referred to. It is provided in the certificates that they are payable solely from the mortuary fund. It is also provided by the certificates and by the trust agreement hereinbefore referred to, that on the distribution of the Safety Fund among the certificate-holders, all liability on the certificates shall thereupon cease and determine.

It was claimed by the plaintiffs that the expense dues received by the Hartford Life Insurance Company could be levied only for the purpose of paying the expenses of the Safety Fund Department of the Hartford Life Insurance Company, and that as the Company ceased to issue new certificates and transact new business at a period not later than 1899, the Hartford Life Insurance Company was not entitled to said expense dues after that period, and that the plaintiffs were entitled to an account for the amount of such expense dues received after the payment of the expenses actually incurred by the Hartford Life Insurance Company in connection with the business. It has been ruled by the Supreme Court of this State, and is so held by this Court, that said three dollar expense dues did not become a part of the funds of the Safety Fund Department, but

that they belong to the Insurance Company without accountability to the certificate-holders, and that said Company is entitled to collect the same so long as there is any outstanding certificate of insurance. The plaintiffs made no claim at the time of the trial for any such account of said expense dues, and made no claim for relief on account of the collection or receipt of the same, and the plaintiffs are not entitled to any such relief.

It was also claimed that the Insurance Company had from time to time diverted moneys and property of the Safety Fund Department from such Safety Fund Department to the Stock Department without right.

The plaintiffs after submitting evidence on the trial in support of said claim withdrew their demand therefor and admitted that the circumstances appearing to indicate such diversion arose from the difference in the method of keeping accounts appearing by their reports to the Insurance Department, and it is found that the Insurance Company has not wrongfully diverted such sums from the Safety Fund Department to the uses of the Stock Department.

It was claimed by the plaintiffs that the defendants other than the corporations, as officers and agents of said Insurance Company, took their offices with knowledge of the various wrongful and fraudulent acts recited in the complaint, and had accepted the benefits of said fraudulent transactions. But it is held that said defendants, namely, George E. Keeney, Lewis Sperry, Rienzi B. Parker, Louis E. Gordon, Everett J. Lake, James H. Knight, Raymond G. Keeney, Andrew Gordon, Arthur F. Eggleston and Charles H. Bacall became connected with said defendant Insurance Company and took their positions in said Company at a date subsequent to the acts complained of and recited in said complaint, and have not participated in and are not guilty of any fraudulent acts or transactions in connection with the management of the Safety Fund Department of said Insurance Company.

Plaintiffs are not entitled to an account, a receiver, damages, or other relief except as herein granted.

Defendant Charles H. Bacall and Arthur F. Eggleston died after the commencement of this action and before any judgment was rendered therein.

Whereupon it is adjudged and decreed, that said mortuary fund of the Men's Division arising from the excess of the amount received for quarterly assessments over the amount necessary for the payment of losses for said quarter, as above described, or from any other source, together with all income or interest thereon, belongs to the certificate-holders in the Men's Division of the Safety Fund Department, and the Insurance Company is reasonably entitled to hold the same as a necessary and proper fund for the settlement of death claims on the certificates of insurance in said department.

Further, that in the future, any excess in said fund above the average of the four preceding quarterly assessments in said Men's Division of the Safety Fund Department of said Company shall be distributed to the certificate-holders in diminution of assessments by crediting and applying such excess on account of the next succeeding assessment.

Also, that when the amount of outstanding certificates of insurance in the Men's Division of the Safety Fund Department falls to the face amount of one million dollars and the Safety Fund is distributed among the holders of said certificates, the balance, if any, of said mortuary fund remaining in the hands of the Hartford Life Insurance Company, shall be distributed pro rata among the certificate-holders whose certificates are outstanding at that time.

That said Security Company as such trustee within eighteen months from and after July 1, 1910, shall sell and dispose of all present securities and investments of said Safety Fund, other than those which it shall be willing to hold as securities authorized by law, for trust investments, and shall invest the proceeds of such sales in such securities (other than United States bonds) in which trustees are allowed to invest under the law of the State of Connecticut.

That said Security Company, as such trustee, may and shall continue to hold as a part of said Safety Fund, any and all securities (other than United States bonds) in which said fund is now invested, and which constitute investments in which trustees are authorized by law to invest, and which said trustee shall decide to retain as a part of said Safety Fund.

That all of said trust securities which shall be retained by said Security Company in said Safety Fund, shall be valued and so held at their market value at the date of this judgment, and that all securities hereafter purchased by said trustee as a part of the investments of said Safety Fund shall be taken and held as a part of said Safety Fund at their cost price.

That as to all bonds or obligations payable at a fixed time in the future which shall be so retained or hereafter purchased by said trustee as a part of said Safety Fund, the Security Company shall create and carry a sinking fund out of the income of said respective securities for the amortization of the premiums or bonuses above par, which there may be in the valuation or cost of said securities.

In case the present market value of all the securities which are now held by said trustee and which it shall retain as a part of said Safety Fund, together with the cost price of all securities purchased by said trustee under the provisions of this judgment, shall not equal the sum of one million dollars on or before January 1, 1912, then said Security Company, out of its own funds, shall furnish and pay into the principal account of said Safety Fund a sum sufficient to make said fund

up to one million of dollars, which sum so paid in (if any) shall be invested by said trustee in securities in which trustees shall then be authorized by the law of this State to invest.

That said trustee shall have the right and power to sell and transfer from time to time any securities which it may hold in said fund, and shall invest the proceeds of said sales in other securities in which said trustees shall be authorized to invest.

That the Security Company credit to the income account of the Men's Division of the Safety Fund Department, the sum of forty thousand and forty-six dollars and thirty-six cents ($40,046.36) being the excess of the amount hitherto received by it over the compensation which this Court has allowed, with interest thereon as above described.

That the Security Company hold said sum of forty thousand, forty-six and 36/100 dollars $40,046.36) as a separate fund until the conversion of the securities as provided above, and if under this judgment the Security Company is compelled to make up from its own funds any of the principal of the Safety Fund, then the Security Company is authorized and directed to apply such sum of $40,046.36, with the accumulated interest realized thereon from the date thereof, in whole or in part to reimburse said Security Company, so far as may be, for the sum so made up by it. If after the conversion of the securities and the re-establishment of the Safety Fund as provided above, the whole or any partion of said $40,046.36 remains unapplied for the purpose of so reimbursing said Security Company, the Security Company is directed to re-transfer it to the regular income account of the Safety Fund.

That when the conversion and purchase of securities is completed as hereinbefore authorized, the Security Company shall file in this Court a report or account of its proceedings in detail, sworn to by one of its executive officers, and which shall show an investment of one million dollars as the principal of said Safety Fund, and the payment of any excess under this judgment, to the income account of said Safety Fund.

That the said Security Company from this time henceforth shall be entitled to charge and receive for its services as such trustee a sum equal to eight per cent. of the gross income received from said investments, to be paid in semi-annual payments of four per cent. each.

In addition to said eight per cent. of the gross income as compensation, and in addition to such expenses as are authorized by said trust agreement of December 31, 1879, said trustee shall be entitled to be reimbursed for all necessary legal expenses incurred in the protection, and collection of any obligation which shall at any time be held under the authority of this judgment as a part of the principal of said Safety Fund.

It is further adjudged that this litigation is of such a character and the results of such value to all the present certificate-

holders who as a class are interested in this litigation that an allowance should be made from the accounts of the safety fund in aid of the plaintiffs in the payment of the expenses, including the attorney's fees, involved in the conduct of this litigation.

Whereupon it is further adjudged that said Security Company pay to Henry Stoddard, Talcot H. Russell, and John K. Beach, attorneys for the plaintiffs, on or before the expiration of ten days after the judgment in this case shall become final, the sum of twenty-five thousand dollars ($25,000), which sum shall be paid out of the principal of said Safety Fund now in its hands, which shall be applied by the plaintiffs and their said counsel to aid in the settlement of the expenses and attorneys' fees of the plaintiffs in this action, for which the said plaintiffs shall give to said Security Company a receipt certifying to said payment in accordance with this judgment, which certificate shall be carried by said trustee as a part of said principal of the Safety Fund, for reimbursement as hereinafter provided, and said payment shall not constitute a deficiency *pro tempo* in the principal of said fund.

It is also adjudged that said trustee shall semi-annually pay out of and from the income received from the investments of the principal of said fund, the sum of one thousand dollars, and shall pay the same into the principal fund, and shall endorse said payment upon said certificate originally given under this judgment for the payment of said sum of twenty-five thousand dollars ($25,000), which payment, when so endorsed, shall constitute a re-payment *pro tanto* of said sum, and said trustee shall continue to make said semi-annual repayments until said sum of twenty-five thousand dollars ($25,000), has been so repaid, and said Security Company shall be under no other obligation or liability to repay said sum of twenty-five thousand dollars ($25,000) or any part thereof.

It is also adjudged that said Security Company shall conform to all of the agreements contained in said trust contract of December 31, 1879, other than the one with reference to the investments of said trust funds, as to which this judgment shall control; and that the defendant, the Hartford Life Insurance Company, keep said Security Company correctly informed of the names and addresses of the certificate-holders in the Men's Division of the Safety Fund Department, and of the number and amount of such certificates in accordance with the terms of the Safety Fund contract, and furnish said Security Company such other information as may be required in accordance with the terms of said contract.

It is also adjudged that no costs shall be taxed by or in favor of any party hereto.

CURTIS, J.

(Duly certified.)

DEFT'S. EX. 9.

New Haven County, Superior Court, March 23, 1910.
(Same title as in Deft's. Ex. 8.)

JUDGMENT.

This action brought by the plaintiffs in their own behalf and for the benefit of other creditors and certificate-holders in a similar situation as themselves against The Hartford Life Insurance Company, The Security Company, George E. Keeney, Lewis Sperry, Rienzi B. Parker, Charles H. Bacall, Arthur F. Eggleston, Louis E. Gordon, James H. Knight, Raymond G. Keeney and Andrew Gordon, by complaint dated October 19, 1906, alleging that, prior to 1880, there had been devised a plan or form of assessment life insurance known as the "Safety Fund" plan, and that under said plan persons insuring therein were to pay in addition to admission fees, medical examination fees and other expense dues, payments of $10 on each $1,000 of insurance to make up a Safety Fund; that said Safety Fund was to be deposited with the Security Company, defendant, as trustee, and as often as said fund reached an amount sufficient to purchase $1,000, par value, of United States bonds, said trustee was to make investments of said fund therein; and that when the purposes and objects of said Safety Fund in the hands of said trustee had been fulfilled in accordance with the terms of the plan as set forth, said Safety Fund was to belong absolutely to the certificate-holders, and that said Hartford Life Insurance Company was to have no interest therein except in its application for the benefit of its certificate-holders in accordance with the terms of the plan; that in the year 1880 the defendant, The Hartford Life Insurance Company, adopted said plan of insurance and announced to the public and to prospective certificate-holders through its officers, managers and agents that it would do business thereunder, and, for the purpose of inducing prospective certificate-holders to take out certificates, published and caused to be published, and issued various circulars and other writings and literature descriptive of said plan of insurance; that the plaintiffs relied upon the representations and statements contained in said circulars and literature in taking out their certificates; that said company in the year 1899 for fraudulent purposes wrongfully ceased issuing certificates under said plan or form of insurance, and after said date, and after said Safety Fund had reached the sum of one million dollars, said Insurance Company asserted the right and intention to levy upon the certificate-holders for mortuary dues and assessments and for expense dues, without limit as to number or amount, and to levy and demand such

dues and assesments after the outstanding insurance in said Safety Fund Department should be reduced to below one million dollars, and that said Safety Fund did not belong to the certificate-holders, but belonged to said Insurance Company, and that said Insurance Company continues to make said claim; and alleging fraudulent diversions of moneys by the defendant, The Hartford Life Insurance Company, and the individual defendants from the funds and property of the Assessment Department of said Insurance Company, and illegal, excessive and unnecessary collections, and fees and assessments from the certificate holders in said department, and mismanagement of the Safety Fund by the defendants by reason of which large losses had resulted to the Safety Fund in the hands of the trustee, as appears fully in said complaint, and claiming for relief, first, that the true amount of said Safety Fund be ascertained and declared and adjudicated to be the property of the Safety Fund Certificate-holders, and that The Hartford Life Insurance Company has no property therein, and that it be declared and adjudicated that such is the true meaning of said certificates of insurance, or that said certificates be reformed so as to convey said meaning; and praying also for a receiver, an accounting, a forfeiture of the moneys and benefits received by the defendant, The Hartford Life Insurance Company from its certificate-holders, an injunction against The Hartford Life Insurance Company from making its claims in respect to the Safety Fund, damages in the amount of One Million Dollars, and for such other and further relief as in equity might pertain, came to this Court on the first Tuesday of November, 1906, when all the parties appeared; thence by pleadings as on file to September 16, 1908, when the issues between the plaintiffs and the defendants, The Hartford Life Insurance Company and the individual defendants, were closed by the plaintiffs' reply to the answer of The Hartford Life Insurance Company filed on said date; thence said cause came by continuance and by pleadings as on file to January 21, 1909, when the defendant, The Hartford Life Insurance Company, moved the Court for an order that the issue or issues formed by paragraph 21 of the answer of The Hartford Life Insurance Company to paragraph 29 of the plaintiffs' complaint and paragraph 10 of the plaintiffs' reply thereto be heard and determined before any other issue in said cause was tried; thence to January 28, 1909, when the Court after fully hearing the parties by counsel, granted said motion and ordered that the issue or issues made by paragraph 21 of the answer of the defendant, The Hartford Life Insurance Company to paragraph 29 of the plaintiff's complaint and paragraph 10 of the plaintiffs' reply thereto be heard and determined before any other issue in said cause was tried; thence said cause was continued to May 27, 1909, when all the parties except the Security Company, de-

fendant, appeared and proceeded to the trial of the last named issue.

The Court having heard the parties with their witnesses on the last named issue finds the same in favor of the plaintiffs.

Whereupon it is adjudged and decreed that whenever the amount of outstanding insurance in the assessment or Safety Fund Department of The Hartford Life Insurance Company shall be reduced by death, lapse or other causes, to the amount of One Million Dollars, the Safety Fund in the hands of the trustee is to be distributed among such of the plaintiffs named in the complaint herein as shall have survived said period, and such other certificate-holders in the Men's Division of the said department of said Insurance Company whose certificates are in force at that time, in the proportion that the face value of their respective certificates bears to the total amount of the outstanding insurance in said division of said Safety Fund Department; provided, however, that none of the contingencies or situations provided for in said contract Exhibit "B" for the distribution of said Safety Fund shall have arisen before that time, but such provisions in said Exhibit "B" shall remain in full force and effect unimpaired by this decree. And as the time when, in the ordinary course of events, the amount of outstanding certificates will be reduced to One Million Dollars is so remote, and that it will ever occur is so uncertain, no other relief under the general prayer should be granted at this time on this issue.

SHUMWAY, J.

Duly certified.

STATE OF CONNECTICUT

New Haven County

Superior Court.

I, Alfred N. Wheeler, clerk of the Superior Court within and for New Haven County, in the State of Connecticut, and keeper of the records and seal thereof, hereby certify that the above and foregoing is a true copy of the judgment file, dated March 23, 1910, which judgment was rendered by Shumway, Judge, in the case of Charles H. Dresser, et als v. The Hartford Life Insurance Company of Hartford, Connecticut, et als.

In testimony whereof I hereunto set my hand and affix the seal of said court, at New Haven, in said county, this fourteenth day of November, 1912.

(Signed) ALFRED N. WHEELER,

(Seal) Clerk.

STATE OF CONNECTICUT,
New Haven County. ss.

I, Gardiner Greene, Presiding Judge of the Superior Court for the State of Connecticut, in said county, do hereby certify that Alfred N. Wheeler, whose name is above written and subscribed, is and was at the date thereof, clerk of said Superior Court duly appointed, commissioned and sworn, and keeper of the records and seal thereof, and that the above certificate by him made, and his attestation of record thereof, is in due form of law.

In testimony whereof I have hereunto set my hand this fourteenth day of November, 1912.

(Signed) GARDINER GREENE,
Presiding Judge.

STATE OF CONNECTICUT,
New Haven County. ss.

I, Alfred N. Wheeler, clerk of the Superior Court of the State of Connecticut, within and for New Haven County, and keeper of the seal thereof, hereby certify that the Honorable Gardiner Greene, whose name is within written and subscribed, was on the fourteenth day of November, 1912, and now is Presiding Judge of said court, duly appointed, commissioned, sworn and qualified; and that I am well acquainted with his handwriting and official signature and know and hereby certify the same within written to be his.

In testiomny whereof I hereunto set my hand, and affix the seal of said court at the city of New Haven, in said county and state, on this fourteenth day of November, 1912.

(Signed) ALFRED N. WHEELER,
Clerk.

DEFENDANT'S EXHIBIT 11 (Ex. 30 of Deposition.)

MARCH 31ST, 1910.

(Mortuary Balance $168,473.58.)

Death Losses incurred but theretofore unassessed for		$540,000.
Assessed for—Call No. 127	$323,919.95	
Death Claims unassessed for	216,080.05	
	$540,000.00	
Death Losses theretofore unassessed for March 31		$540,000.
Paid theretofore	$200,333.33	
Unpaid	339,666.67	
	$540,000.00	
Death Losses Assessed for Call No. 127		$323,919.95
Theretofore paid	$198,994.19	
Unpaid	124,925.76	
	$323,919.95	
April Death Losses		$99,000.

APRIL 30TH, 1910.

(Mortuary balance $89,371.87.)

Death Losses incurred but theretofore unassessed for		$639,000.00
Assessed for—Call No. 127	$323,919.95	
Incurred but unassessed for	315,080.05	
	$639,000.00	
Death losses theretofore unassessed for		$639,000.00
Paid prior to April 30th	$303,333.33	
Unpaid on April 30th	335,666.67	
	$639,000.00	
Assessed for on Call 127		$323,919.95
Paid April 30th and prior	$282,419.95	
Unpaid	41,500.00	
	$323,919.95	

DEFENDANT'S EXHIBIT 13 (Ex. 46 of Deposition.)
DEATH LOSSES INCURRED, MEN'S DIVISION, DURING THE YEAR 1910.

January	$120,000
February	138,000
March	140,000
April	99,000
May	121,000
June	95,000
July	93,500
August	86,000
September	103,000
October	138,500
November	112,000
December	99,500

DEFENDANT'S EXHIBIT 14 (Ex. 51 of Deposition.)

Year.	Received from Mortality Calls.	Paid for Death Losses.
1880	$ 21,551.02	$ 17,965.00
1881	118,263.17	111,603.00
1882	158,710.19	147,440.00
1883	210,823.83	199,165.00
1884	217,047.36	207,427.00
1885	386,204.91	434,415.00
1886	515,029.50	516,940.00
1887	573,775.08	531,589.00
1888	626,517.40	625,466.00
1889	676,937.06	702,368.94
1890	800,199.27	779,085.55
1891	906,179.19	905,122.00
1892	1,065,525.94	1,023,608.28
1893	996,065.14	1,059,775.00
1894	1,031,351.22	1,039,561.00
1895	1,132,808.93	1,141,153.76
1896	1,125,972.73	1,108,487.37
1897	1,121,550.87	1,241,921.17
1898	1,289,080.22	1,130,084.20
1899	1,279,544.53	1,201,784.49
1900	1,297,629.67	1,347,949.07
1901	1,402,750.62	1,403,343.01
1902	1,371,681.50	1,333,691.73
1903	1,177,544.63	1,167,953.16
1904	1,341,198.26	1,269,899.72
1905	1,341,165.22	1,444,994.11
1906	1,277,385.39	1,217,377.79

1907	1,170,510.06	1,110,045.50
1908	1,183,143.62	1,296,621.37
1909	1,257,737.17	1,282,107.56
1910—March 31	327,794.59	234,259.93
Mortality balance March 31, 1910,		168,473.58
	$27,401,678.59	$27,401,678.59

DEFT'S. EX. 15.

This is the Application. Copy will be furnished the Court on the argument. It is impracticable to print it.

DEFT'S. EX. 23.

Mr. Durment: Now, we offer in evidence Ex. 23 to the deposition, which is the registry receipt for this letter, the letter itself, and the envelope in which it was contained, and I will read the letter; that is, if it is admissible,—I think it is:

"July 29, 1910, Mr. Herman Ibs, 105 Central avenue, St. Paul, Minn. Dear Sir: Having received no reply to our letter of July 1st, we return herewith the money order for $33.95 which you forwarded to the company to cover te call of June 1st on certificate 70,627 on your life. This settlement was made after the certificate had lapsed, and consequently could not be accepted . . . The certificate has no value whatever. As we previously advised you, however, the certificate may be placed in full force and effect providing you make settlement of the overdue call. . . . If you wish to have the insurance placed in force, forward us a money order for $36.95—$35.95 to cover the call referred to above and . . . and $1 to cover the necessary medical examination. We will then forward . . . with full instructions for having it executed. Yours very truly, T. F. Lawrence, Secretary."

And this simply is the envelope showing it was never delivered and came back.

Having examined the foregoing and found it to conform to the truth and to state all the proceedings had upon the trial of the action, it is hereby allowed and signed as and for a Settled Case therein.

Dated January 23rd, 1912.

FREDERICK N. DICKSON,
District Judge.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

THE HARTFORD LIFE INSURANCE COMPANY, HARTFORD, CONNECTICUT,
Plaintiff in Error,

vs.

ELIZA IBS,
Defendant in Error.

No.

IN ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY, MINNESOTA.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

STATEMENT.

I.

GENERAL HISTORY—PLAN OF INSURANCE—CONNECTICUT DECREES.

The plaintiff in error, the Hartford Life Insurance Company of Hartford, Connecticut (hereinafter called the "insurance company") is a corporation chartered under the laws of the State of Connecticut, having its

chief office in that state, and its officers and directors are residents of that state. Under the provisions of its charter it is engaged in the transaction of life insurance of several varieties, but its principal business is and was conducted on the assessment plan which is known as its "Safety Fund Department", which in turn is made up of two divisions—the Men's Division and the Women's Division. We are concerned here only with the Men's Division of the "Safety Fund Department", the principal features of which are as follows:

Each person applying for insurance, in addition to an entrance fee proportioned to the amount of insurance desired, agrees to pay, annually, three dollars per thousand of insurance, as expense dues, also mortuary payments or assessments, to meet death losses, which assessments are graduated in proportion to the policy-holder's age when the assessment is made, the amount of his policy and the total amount of insurance or indemnity in force under his certificate or policy. Each certificate or policy provides that mortuary assessments are to be levied **to form a Mortuary Fund** for the payment of all indemnity matured by deaths of members, which assessments are to be levied upon all members whose certificates are in force at the date of such deaths, with "due allowance for discontinuance of membership". The policies provide that the death losses are to be paid out of the **Mortuary Fund, and not otherwise.** That is to say, the plan contemplates and the policies provide for mortuary asesssments based upon and determined by deaths which have already occurred, and that the assessments shall be made against the surviving certificate holders according to a defined scale, and that the proceeds of these assess-

ments shall go into and form the Mortuary Fund from which the death losses shall be paid. The applicant for insurance also pays ten dollars for each one thousand dollars of insurance, the aggregate of which ten-dollar payments go into the Safety Fund; hence the name "Safety Fund Department". These payments are, as collected by the company, turned over to the Security Company, trustee, for investment. When the Safety Fund reached the sum of $300,000 its earnings, and when it reached the sum of $1,000,000 the earnings and all further contributions to it were turned over, and are being turned over, by the trustee company to the insurance company, and the insurance company in turn has distributed, and is distributing, the funds so received amongst the outstanding certificate holders entitled thereto, in proportion to the face value of their certificates. The outstanding certificates in the Safety Fund Department aggregate about twenty-five millions of insurance in force, but the policies provide that **when the insurance under outstanding certificates shall be reduced by death or lapsation to $1,000,000 the Safety Fund is to be distributed amongst the then certificate holders and the insurance is to terminate.**

The policies further provide that if said company (F. 344) "shall fail by reason of insufficient membership, or, shall neglect if justly and legally due, to pay the maximum indemnity provided for by the terms of any Certificate issued in said Department, and such Certificate shall be presented for payment to said Trustee by the legal holder thereof, accompanied by satisfactory evidence, as hereinafter provided of its failure to pay, after demand upon it within the time herein stipulated for limitation of action, then it shall be the duty of said Trustee to at once convert said

Safety Fund into money and divide the same * * * among all the holders of Certicates then in force", etc. Further (F. 359) "if any final division from said Safety Fund, as hereinbefore provided, shall be made by the Trustee thereof on account of this Certificate, then, in all such cases, all liability of said Company and of its Safety Fund, on account of this Certificate, shall cease."

The assessments are levied quarterly. At the expiration of a quarter the aggregate of all that was due for deaths occurring during such quarter was ascertained, an assessment upon the certificate holders for an amount sufficient to cover such aggregate was made out upon the stipulated basis, and notices or calls were sent to the certificate holders, which notices contained a list of the deaths on which the assessment was based, and a statement of the amounts due for such assessment by the certificate holder to whom the notice was sent, a statement of the amount of the expense dues then owing by such certificate holder and a demand for payment. In the nature of things, such an assessment could not be exact, producing, if too small an allowance was made for lapses, too small a sum, if too large an allowance, too large a sum. In twenty years operation the aggregate allowance for lapses was greater than the actual lapsation, and from that source margins from excess payments arose from time to time, and were accumulated in the hands of the insurance company in the Mortuary Fund. The Mortuary Fund thus accumulated has been used constantly by the insurance company in the prompt payment of losses, which were paid when due from this fund, regardless of whether the assessment on which a particular death was in part based, had been collected or not.

In the year 1906 a suit was brought in the Superior Court of New Haven County, Connecticut, against the insurance company and its directors by twenty-nine certificate holders, residing in various states, to-wit, Connecticut, Indiana, Florida, New York, Kentucky, Massachusetts, Michigan, Ohio, Minnesota, Georgia, Louisiana, Vermont, Illinois, Missouri and North Carolina, who brought such suit in their own behalf, and for the benefit of other certificate holders similarly situated. The suit, Dresser *et al.* v. Hartford Life Insurance Company *et al.*, was brought for the purpose, amongst other things, of compelling the insurance company to distribute the Mortuary Fund amongst the certificate holders. The case went to the Supreme Court of Errors of the State of Connecticut (it is reported in 80 Conn. 681), and finally resulted in the entering on March 23, 1910, in the Superior Court in New Haven County, of a decree which, so far as the question under consideration is concerned, was as follows:

> "It was claimed by the plaintiffs that the defendants were levying assessments **unnecessary in amount** and number for their own **wrongful purposes.** The Hartford Life Insurance Company levied the assessments provided for in the plan and in the certificate above set forth, quarterly, and the proceeds of such assessments when received by said insurance company were paid into and credited to the Mortuary Fund described in the contract of insuarnce. The Hartford Life Insurance Company did not levy assessments **unnecessary in amount or number.** It appeared, however, that the allowance made for discontinuance of membership, although made in good faith, often exceeded the actual amount necessary to

cover the deficiency in payments arising from such discontinuances, and that from that source margins of excess of payment arose from time to time, consisting of the difference between the aggregate amount actually received by said insurance company from such quarterly assessment, and the amount needed to pay the losses for the corresponding quarterly period. It also appeared that although the company in practice levied assessments to cover the full amount of the face value of the certificates for each death during the previous quarter, they deducted an actual payment from the face of such certificates a certain proportion of the assessment which would have been due from the certificate holder had he survived the quarter, which sum is proportioned to the portion of such quarter which had elapsed at the time of the death of such certificate holder, and there was therefore a margin arising from this circumstance between the amount of the losses paid and the amount of the losses assessed for. These margins accumulated from time to time in the hands of the Hartford Life Insurance Company in its Mortuary Fund, have always been and are now in constant use in the prompt payment of losses in advance of the receipt of the moneys to pay the same from the regular assessments, by which receipts the said fund is constantly reimbursed. Said accumulation of margins, although in constant use, are capable of exact determination in amount, and now amount to many thousands of dollars.

"The plaintiffs claimed it was improper and it is held that it is proper and reasonable that the wrongful to accumulate these margins and to carry this balance in said Mortuary Fund, and claimed that said balance of margins should be distributed amongst the outstanding certificate holders, but

company should hold some such fund for the purpose of enabling it to pay losses promptly, but it is not necessary for that purpose that the company should hold more than the amount of one average quarterly assessment for the previous year."

And it was accordingly (F. 835):

"Adjudged and decreed, that said Mortuary Fund of the men's division arising from the excess of the amount received for quarterly assessments over the amount necessary for the payment of losses for said quarter, as above described, or from any other source, together with all income or interest thereon, belongs to the certificate holders in the men's division of the Safety Fund Department, and the insurance company is reasonably entitled to hold the same as a necessary and proper fund for the settlement of death claims on the certificate of insurance in said department.

"Further, that in the future, any excess in said fund above the average of the four preceding quarterly assessments in said men's division of the Safety Fund Department of said company shall be distributed to the certificate holders in diminution of assessments by crediting and applying such excess on account of the next succeeding assessment.

"Also that when the amount of outstanding certificates of insurance in the men's division of the Safety Fund Department falls to the face amount of one million dollars, and the Safety Fund is distributed among the holders of said certificates, the balance, if any, of said Mortuary Fund remaining in the hands of the Hartford Life Insurance Company, shall be distributed pro rata among the certificate holders whose certificates are outstanding at that time."

The Supreme Court of Connecticut, in the same case (Dresser v. Hartford Life Insurance Company, 80 Conn. 681, 709, 70 Atl. 39, 49), in construing the clause of the contract having reference to the failure to pay a matured indemnity within the ninety days provided by the contract, stated:

> "Clearly by the word 'fail' is not meant a default in any obligation assumed by the insurance company. While the company undertakes to make the assessments (Lawler v. Murphy, 58 Conn. 295, 20 Atl. 457, 8 L. R. A. 113), and to pay the sum collected, its express agreement is to pay the amount of certificate **from the Mortuary Fund and not otherwise'**. If, after an assessment for the payment of the amount due upon a certificate is properly made and the assessment paid, the amount realized proves insufficient to pay the indemnity due, **the failure is that of the Mortuary Fund**, and not of the insurance company."

It would appear, therefore, that the Mortuary Fund is a real and substantial element in the contract of the parties—one upon which the continuance of the insurance was entirely dependent and that if the Mortuary Fund is permitted to fail the whole plan of insurance fails also.

The average quarterly assessment referred to in the decree was somewhat in excess of three hundred thousand dollars, to-wit, $315,000.

The insurance company has ever since been operating in conformity with the terms of this decree, and has ever since endeavored to maintain its Mortuary Fund at or near the sum of $300,000.

II.

THE FACTS IN IBS' CASE.

In the year 1885 Herman Ibs of St. Paul, Minnesota, made application for insurance in the Safety Fund Department of the defendant company, and having duly paid his entrance fees and Safety Fund deposit, received a certificate, No. 70627, dated April 4th, 1885, payable to his wife, Eliza Ibs as beneficiary. The certificate and the application therefor, which is expressly made a part of the contract, are set forth in full in the record. They contain a full statement of the plan of the insurance and its conditions as above outlined.

The application for membership (Defendant's Exhibit 15), which forms a part of the contract, contains this provision:

> "If I or my representatives shall omit or neglect to make any payment as required, in respect of amount, place and time of payment, by the condition of such certificate, then the certificate to be issued hereon shall be null and void, and all money paid thereon shall be forfeited to said company."

By the certificate of membership it is provided that it is issued in consideration of the (F. 337).

> "Payment 'of $3 per annum on each $1,000 for expense dues, to be paid as hereinafter conditioned, and of the further payment of **all assessments** proportioned to the maximum indemnity herein provided for, **levied** against the herein named member **to form a Mortuary** Fund for the payment of all indemnity matured by deaths of members, which assessments to be levied upon all the members in the department wherein this cer-

tificate is issued, whose certificates are in force at the dates of such deaths, shall be made according to the table of graduated assessment ratios given herein, and as further determined by their respective ages and the aggregate maximum indemnity at the dates of such deaths, with due allowance for discontinuance of membership."

The certificate further provides (F. 354):

"The member agrees to pay to said company dues of three dollars per annum on each $1,000 indemnity, for expenses, on the first day of the month after date of issue hereof, and at every anniversary thereafter, so long as this certificate shall remain in force, or by monthly or other *pro rata* installments of the same in advance for periods of less than a year. And also agrees to pay said company, upon all certificates that shall mature by death, within thirty days from day on which notices bear date, **all assessments determined as within set forth; the proceeds of which,** after deducting ten cents on each assessment for cost of collection, **shall form said Mortuary Fund.**"

By the certificate it is also expressly provided (F. 341), that the **indemnity agreed to be paid** shall be **payable out of the Mortuary Fund so to be created by assessments, as above set forth, and not otherwise.**

The certificate further provides (F. 357):

"The member further agrees and accepts this certificate upon the express condition that if either the annual dues, assessments or Safety Fund deposit as hereinbefore required, are not paid to said company on the day due, then this certificate shall be null and void, and of no effect, and no person shall be entitled to damages or the recovery of any moneys paid for protection while the certifi-

cate was in force, either from said company or the trustee of the Safety Fund."

From the date of the certificate or policy quarterly assessments for death losses were made, always in the same manner, notices were sent and calls were made for the amount due on account of such assessments and for the quarterly expense dues, all of which were paid by Mr. Ibs, save the last one, No. 127. This call and the assessment upon which it was based, differed in no respect, save in names and amounts, from previous calls and assessments. The assessment was made for one hundred and forty-five deaths, the benefits due therefor aggregating $323,919.95. Accompanying the call was a list containing the names of the deceased members, the dates of their deaths, beginning September 23rd, 1909, and ending February 13th, 1910, and the amount due each. The call and accompanying list were sent to Mr. Ibs May 2nd, 1910. The notice was in form as follows:

"SPECIAL NOTICE OF QUARTERLY CALL.
No. 127.

Your next quarterly call will fall due and be payable Sept. 1, 1910.

HARTFORD LIFE INSURANCE COMPANY,
Hartford, Conn., May 2, 1910.

Second Notice.

Herman Ibs,
105 Central Ave., 35
St. Paul, Minn.
2-70627.

This call which will be due June 1st, 1910, is made to meet 145 deaths (as shown by accompany-

ing list), benefits, $323,919.95, and expenses on your policy, as follows:

For Mortality Call.....$33.95
For quarterly dues to Sept. next..... 1.50

Credit ..... $.....

Amount due.....$35.45
Registration fee..... .50

Payment will not be accepted later than June 5, 1910, unless residence is on or west of the meridian of Salt Lake, Utah, in which case payment will be accepted up to and including June 15, 1910.

Unless the payment called for by this notice shall be paid to the company at its home office by or before the day it falls due the policy and all payments thereon will become forfeited and void.

Return this notice with remittance payable to HARTFORD LIFE INSURANCE COMPANY.

Make all remittances by draft, check, Post Office or express money order when possible. Letters containing currency must be registered.

(See over for special notice.)"

No attention having been paid to this notice a second notice was sent Mr. Ibs, but still without result. The policy lapsed by its own terms on June 5 and was finally canceled by the company June 23rd, 1910. Mr. Ibs died June 27th, 1910.

On June 29th, 1910, Mrs. Ibs sent the amount of the call to the insurance company without notifying it of the death of her husband. The money was returned by the insurance company with a statement that the policy had been canceled June 23rd.

Thereupon this suit was instituted in the District Court, County of Ramsey, State of Minnesota, by Eliza

Ibs, the beneficiary in said policy, and the defendant in error herein.

III.

THE ISSUES IN THE IBS CASE.

The complaint was in the ordinary form upon the certificate.

The answer admitted the issuance of the certificate in April, 1885, its continuance in force until June 5, 1910, and the death of Hermar Ibs on June 27, 1910, and that the respondent is the widow of the assured.

The answer pleaded affirmatively that the continuance of the certificate or policy in force was conditioned upon the payment on the day due, of the annual dues and assessments, and if not so paid that the certificate or policy became, by its terms, null and void; that the said Herman Ibs elected to pay his annual dues quarterly in advance; that by the terms of the contract assessments were due and payable within thirty days from the day of the date of the notice; that on May 2, 1910, the company duly made and levied an assessment against the said Herman Ibs for $33.95; that notice of such assessment was duly given to him; that at the same time and in the same manner and by the same notice it demanded the payment of the quarterly dues amounting to $1.50; that said Herman Ibs failed and neglected to pay said assessment and also failed to pay such dues on or before June 1, 1910, or on or before June 5, 1910, the date to which payment was extended; that by the terms and provisions of said policy and application, the failure of said Herman Ibs to pay said assessment, as well as his failure to pay said dues, terminated said certificate or policy. The answer also pleads:

"Defendant further alleges that the contract or certificate sued on is one of many similar certificates issued by the defendant to numerous other members of the Safety Fund Department, Men's Division, of the defendant company; that each of said certificates provides, as does the certificate sued on, for the levy and collection of assessments, the proceeds of which are to constitute the Mortuary Fund referred to in the certificate sued on, from which, upon the death of the holder of any such certificate, the indemnity provided for therein is to be paid; that the indemnity provided for in each of said certificates is payable only out of said Mortuary Fund and defendant is not otherwise liable for the indemnity provided for by said certificate; that under and by the terms of said certificates the defendant is the trustee of said Mortuary Fund, that said certificates create an express trust as to such fund; members holding said several certificates, so long as they are in force, and the member continues alive (and after the death of the member, while the certificate is in force, the beneficiary designated therein) are the *cestui que trustents* of said Mortuary Fund; that said Mortuary Fund has always been maintained in the State of Connecticut; that said fund and the said trust under which it is held is subject to the control and direction of the courts of general jurisdiction of the State of Connecticut, and particularly, of the Superior Court of New Haven County and the Supreme Court of Errors of the State of Connecticut; that the manner in which said Mortuary Fund and the trust under which it is held shall be administered, has been the subject of adjudication by the courts of general jurisdiction of the State of Connecticut, to-wit, by said Superior Court of New Haven County and the Supreme Court of Errors of the State of Connecti-

cut, in the case of Charles A. Dresser, et al. v. Hartford Life Insurance Company, which said courts have jurisdiction over this defendant and over said fund, in which case said courts adjudicated and directed how the said Mortuary Fund should be administered; that a copy of the decrees and judgments of said Superior Court of New Haven County are hereto attached, marked respectively Exhibits 'B' and 'C', and the opinion of said Supreme Court of Errors of the State of Connecticut referred to in said decree will be found reported in 80 Conn. 681, to which reference is hereby made; that said Mortuary Fund and the trust thereby created is being administered by the defendant strictly in accordance with the terms of said certificates and in accordance with the directions and adjudications of said courts of Connecticut, as shown by said decrees and opinion; that under the terms of said certificates and under the terms of said trust as construed and adjudicated by said courts the defendant is without authority to pay out of said Mortuary Fund the amount of any certificate of membership, where, as in the case of Herman Ibs, the member has failed or refused to pay the assessment levied against him to maintain said fund."

The reply admitted that the application formed a part of the certificate or contract; that Herman Ibs paid his dues quarterly; that notice of May 2, 1910, was duly issued and received by the insured and that he failed to pay both the assessment and dues due June 1, 1910, but pleads that the assessment was excessive, unnecessary and unlawful.

It will be seen that the pleadings in the Ibs case raised the exact issue which had been determined by the Connecticut Court in the Dresser case, *supra*.

This was in fact the only issue in the case. The evidence in the case consisted of the deposition of the secretary of the insurance company and various documents set out in the record. There was no dispute or controversy as to any fact in the case. The right to recover was based solely on the proposition that the cancellation of the policy was void, because it was canceled for the non-payment of an unnecessary and illegal assessment, and for the non-payment of expense dues, the demand for which was coupled with the demand for the illegal assessment.

The evidence showed that the assessment was levied in the customary manner and in strict conformity with the contract. It also showed that all credits had been given the policy-holder for earnings of the Safety Fund and that there was nothing due on that account.

It further showed that the work of preparing the assessment, the preparation of which required about thirty days' time, was begun April 1st, 1910. It showed further that upon March 31st, 1910, there was in the Mortuary Fund the sum of $168,475.58. Of the death losses for which the assessment was levied, aggregating $323,919.95, there had been paid from the Mortuary Fund, prior to March 31st, $198,994.29, leaving unpaid $124,925.76. The payment of these would leave a balance in the fund of $43,547.82. As against this balance there were on March 31st death losses, not included in the assessment, amounting to $216,080.85, of which $1,339.04 had been paid, leaving unpaid and unassessed for, $214,741.81. The evidence further showed that the death losses averaged something over $100,000 a month, and in excess of $300,000 a quarter as heretofore stated.

The insurance company offered in evidence the de-

crees of the New Haven County Superior Court in the Dresser case herein mentioned, together with the statutes of Connecticut, showing the jurisdiction of the Court. The objection of the plaintiff, Eliza Ibs, to the decrees and statutes was sustained and the jury under the instruction and direction of the Court found a verdict for plaintiff in the sum of $2,268.32. The insurance company duly filed its motion for judgment, notwithstanding the verdict or for a new trial, which motion was overruled.

IV.

THE OPINION OF THE SUPREME COURT OF MINNESOTA IN THE IBS CASE.

An appeal was duly taken to the Supreme Court of Minnesota, which Court affirmed the court below, and directed the lower court to enter the judgment to reverse which the writ of error here is prosecuted. The Supreme Court of Minnesota, in its opinion upon the question of the Connecticut decrees, states:

> "It is claimed that it was prejudicial error to exclude from evidence the decrees in the case of Dresser *et al.* v. this defendant *et al.*, in the Superior Court of New Haven County, Connecticut. **It is also claimed that in excluding these decrees, the trial court violated Section 1, Article IV, of the Constitution of the United States, providing that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state'**, and also Section 10, Article I, of such Constitution, forbidding any state to pass any law 'impairing the obligation of contracts'. The Dresser case was brought by the plaintiff on behalf of himself and other policy-

holders of defendant against the company and its officers, and the custodian of the 'Safety Fund'. The main issue in the case was in regard to the Safety Fund and its management, but it was also claimed by plaintiffs that the defendants, the company and its officers, were levying assessments unnecessary in amount and number for their own wrongful purposes. It was adjudged that this was not true. It was claimed that it was improper and wrongful for defendant to accumulate the margins arising from the difference between the amount of losses paid and the amount of losses assessed for, and to carry this balance in the Mortuary Fund, and claimed that this balance of margins should be distributed among the outstanding certificate holders, but it was held that it was proper and reasonable that the company should hold some such fund to enable it to pay losses promptly, that the Mortuary Fund thus formed belongs to the certificate holders, and that the company is reasonably entitled to hold the same as a necessary and proper fund for the payment of death claims.

"We are not able to see how these decrees have any material bearing on the issues in the case at bar, much less how they are controlling. The issues here are vitally different from those in the Dresser litigation. There was no question there of a forfeiture, nor of the legality of an assessment levied to pay specified death losses, when the balance in the Mortuary Fund was ample to pay all such losses. The right to hold a balance in the Mortuary Fund was affirmed, but not the right to forfeit a policy for non-payment of an unnecessary assessment. Neither the issues or the parties were the same in the case at bar. The decrees are not even authority against plaintiff's contentions here; much less are they binding on

the principle of *res adjudicata,* or estoppel by judgment. This question is discussed and we think correctly disposed of in Johnson v. this defendant, 166 Mo. App. 261. **We hold that it was not error to exclude from evidence the decrees in the Dresser case, and that neither constitutional provision referred to was violated."**

It will thus be seen that the Connecticut decrees, and their controlling effect under the Federal Constitution were not only pleaded and proved in the trial court **but the right claimed thereunder because of the full faith and credit clause** was expressly decided and **denied by the Supreme Court of Minnesota."**

ARGUMENT.

I.

No question is raised by this record as to whether the federal questions involved were properly presented and preserved. In fact, this is conceded by counsel for defendant in error in their statement (page 7), as follows:

> "The Minnesota Court, in its opinion, states that the defendant then claimed that the excluding of the two decrees violated the two sections of the Constitution above referred to; but it held that neither of the constitutional provisions was violated. **It appears therefore sufficiently from the printed record that the plaintiff in error especially set up and claimed these alleged federal questions.**"

Under the decisions of this Court plaintiff in error is entitled to maintain this writ.

> Green v. Van Buskirk, 7 Wall. 139:
>
> "The question raised on the motion to dismiss was, whether the Supreme Court of New York, in this case had decided against a right which Green claimed under the Constitution and an Act of Congress. If it had, then this Court had jurisdiction to entertain the writ of error, otherwise not. It was insisted on the one side and denied on the other, that the faith and credit which the judicial proceedings in the courts of the State of Illinois had by law and usage in that state were denied to them by the Supreme Court of New York, in the decision which was rendered.
>
> "Whether this was so or not could only be prop-

erly considered **when the case came to be heard on its merits**; but this Court, in denial of the motion to dismiss, held that the Supreme Court of New York necessarily decided **what** effect the attachment proceedings in Illinois had by the law and usage in that state, and as it decided **against the effect which Green claimed for them**, this Court had jurisdiction under the clause of the Constitution which declares 'that full faith and credit shall be given in each state to the public acts, records and judicial proceedings in every other state', and the Act of Congress of 1790, which gives to those proceedings the same faith and credit in other states that they have in the state in which they were rendered.

"This decision, supported as it was, by reason and authority, left for consideration, on the hearing of the case, the inquiry whether the Supreme Court of New York did give the attachment proceedings in Illinois the same effect they would have received in the courts of that state."

West Side R. R. Co. v. Pittsburgh Construction Co., 219 U. S. 92, 99;
Griffith v. Connecticut, 218 U. S. 563;
American Express Co. v. Mullins, 212 U. S. 313;
Jacobs v. Marks, 182 U. S. 583, 587;
Hancock Nat. Bank v. Farnum, 176 U. S. 640, 642;
St. Louis I. M. & Southern R. R. v. Taylor, 210 U. S. 281, 293;
Huntington v. Attrill, 146 U. S. 657, 684;
Carpenter v. Strange, 141 U. S. 87, 103.

The Minnesota Court in express terms excluded the decree of the Connecticut Court and refused to be in any manner bound or guided by it, and expressly decided **"that neither of the constitutional provisions referred to was violated"**. Two reasons were assigned

by the Court for so holding; one that the parties were not the same, the other that the issues were not the same. Let us examine these reasons separately.

THE PARTIES.

(*a*) It is not necessary that the defendant in error, the beneficiary, Eliza Ibs, should have been a party of record in the Connecticut action. She was certainly in privity with her husband, Herman Ibs, the certificate holder. A cancellation of the certificate by him, during his lifetime, would destroy any rights which she had therein. Any act done or suffered by him, during his life, the effect of which would be to terminate the contract, would terminate all rights of the beneficiary thereunder.

(*b*) Herman Ibs, the holder of the certificate in suit, was a party by representation, and the decree was binding upon him. This we will hereafter discuss. The certificate holders, thirteen thousand in number (Transcript, page 31), all having exactly the same rights in the subject-matter and the same interest in the question to be determined, constitute a "class", under all existing definitions of the term.

(*c*) While there were other issues involved in the Dresser case in which there was possibly a conflict of interests between the plaintiff in error and the certificate holders, there was no such conflict as to the question of maintaining a sufficient and proper amount in the Mortuary Fund. There was merely a conflict of views as to the proper policy to be pursued. The plaintiff in error is a mere trustee conducting the business for the certificate holders for a defined compensation. A trustee seeking the instructions and directions of a court having jurisdiction, is not obliged to make his

cestui que trustent parties to the application; certainly not when they are so numerous, and reside in so many different states, that it is practically impossible. It matters not whether the trustee seeking and asking for such instructions and directions is before the Court upon his own initiative, or upon the initiative of all or any of his *cestui que trustent.*

IDENTITY OF ISSUES.

It is difficult to follow the reasoning of the Minnesota Court upon the question of the identity of the issues involved in these cases. The Connecticut Court held that it was right and proper for plaintiff in error to refuse to distribute the whole of the Mortuary Fund in its hands, and that it should retain therein the amount of one quarterly assessment, $315,000, and distribute only the excess over that amount, if any, in the way of credit upon the next assessment; the Mortuary Fund to be used by the company in the manner in which it had theretofore been used, *i. e.*, in the prompt payment of losses; and, it may be remarked, that in the case of small insurers, such as those in question, it is emphatically true that *"bis solvet qui cito solvet"*. The maintenance of the Mortuary Fund as a matter of course requires its replenishment, when diminished by payments therefrom. The Minnesota Court, in its opinion, does not dissent from this, but says that the question presented in this case, whether an assessment could be legally levied, when the proceeds thereof were to be used in the payment of future losses, was not involved in the Connecticut case.

We respectfully submit that no such question arises in this case. The facts are as follows: Accepting for the sake of argument, the unwarranted assumption of

the Minnesota Court, that the date of the assessment is the date at which the preparation for making it begins, and not the date at which it is made or the date at which it is payable, on March 31st, losses to the extent of $540,000 had been incurred and had not been assessed for. Of these $200,000 (we use round figures for convenience) had been paid out of the Mortuary Fund, leaving $340,000 unpaid. There was on hand in the Mortuary Fund $168,000. The assessment was for one hundred and forty-five deaths (the last being February 13th), aggregating $323,000. This amount when paid into the Mortuary Fund as required by the agreement would raise that fund to $491,000. Against this fund there were unpaid losses incurred prior to March 31st of $340,000. The payment of these losses would reduce the fund to $151,000, less than one-half of the authorized amount. Or, to put it in another way, out of the proceeds of the assessment, $147,000 was required to bring up the Mortuary Fund to $315,000, leaving $176,000 to be paid on account of the $340,000 accrued losses. The $147.000 paid to restore the Mortuary Fund to $315,000 would certainly be paid on account of past deaths, to-wit, part of the one hundred and forty-five listed. Does it make any difference whether plaintiff in error waited for the collection of the assessment and paid the proceeds to the beneficiaries in question, or whether it paid them, without waiting, out of a fund in its hands, solemnly created and sacredly maintained for that purpose, and turned the proceeds of the assessment, when collected, into that fund? The matter can be stated in many ways, but no matter how stated, it will be perfectly clear that there is no question of an assessment to pay future losses involved.

The Minnesota Court, apparently reached its conclusion through two erroneous assumptions; first, that an assessment could only be levied **to pay the particular beneficiaries of certificates listed** in the call, and could not be levied to **replenish, i. e., maintain the Mortuary Fund**; second, that the application of the proceeds to the payment of any losses incurred prior to either the date or the collection of the assessment but after the last death listed (in this case, February 13th) would be **a payment of future losses.** The first is a misconstruction of the contract, the second a misconstruction both of the contract and of the facts. If, however, the Court meant that the fund, replenished by the assessment levied for losses theretofore incurred, was to be used for the prompt payment of losses in the future, as it had been in the past, and thus the proceeds of the assessment, though paid into the fund to restore amounts paid therefrom for past losses, would be indirectly used for the payment of future losses, and that said use was "illegal", then the Court either misunderstood the Connecticut decree or refused to be bound by it. Certain it is that the rule laid down by the Minnesota Court for the plaintiff in error to follow, would not result in the maintenance even of the $168,000, which it had in the fund, but would result in the **extinguishment of that fund and the destruction of the Safety Fund Department.**

The Minnesota Court stated as a second reason why the issues were not identical, that there was a question of forfeiture involved in this case which was not involved in the Connecticut case. The question of "forfeiture", so-called, was equally involved in both cases. The "forfeiture" is merely the result, and the inevitable result, of the non-payment of **a legal assessment.**

What constitutes a **legal assessment,** is the basic question, which was involved in both cases alike. Strictly speaking, there is not, under the terms of these certificates any "forfeiture". The failure to pay a legal assessment, in and of itself, terminates the contract. No declaration of forfeiture is required, nor is any notice. The mere non-payment automatically terminates the contract by virtue of the terms of the contract itself. Nor has the plaintiff in error, a mere trustee for the certificate holders, any power or authority to change this result. This is not only in accordance with the express terms of the contract, but it is equitable and right, and constitutes the basis upon which all insurance of this nature rests.

This Court, in Klein v. Insurance Company, 104 U. S. 91, has stated the real equity of the matter in the following terms:

> "The provision therefore for the release of the company from liability on the failure of the insured to pay the premiums when due is of the very essence and substance of the contract of life insurance. To hold the company to its promise to pay the insurance, notwithstanding the default of the assured in making punctual payment of the premiums, is to destroy the very substance of the contract."

II.

It is hardly necessary to discuss the contention of counsel for defendant in error that the writ in this case is frivolous and was sued out for the purpose of delay.

There is far more involved in this case than the amount of the certificate. If the decision of the Min-

nesota Court is to stand, the practical effect will be the extinguishment of twenty-six millions of insurance distributed amongst thirteen thousand certificate holders. If the plaintiff in error attempts to conform to the views of the Minnesota Court in the conduct of the Safety Fund Department, and extinguish the Mortuary Fund, the inevitable result will be the winding up of the Safety Fund Department. On the other hand, if it continues to follow the policy directed by the decree of the Connecticut Court in the Dresser case it will be confronted with the difficulty that its assessments are not binding upon, and need not be paid by certificate holders who reside in Minnesota and Missouri (see Missouri cases cited by defendant in error) and in such other states as may hereafter take the same view of the proper policy to be pursued by it. Manifestly the business cannot be conducted under such conditions and an attempt to so conduct it would be unjust and unfair to the certificate holders who are bound by the Dresser decree.

The plaintiff in error has sued out this writ in the utmost good faith, as the only method of protecting its *cestui que trustent.*

The language of the Court in West Side R. R. v. Pittsburgh Construction Co., 219 U. S. 92, 99, is exactly in point:

> "When a party asserts that due faith and credit have not been given to a judgment rendered in an action between him and the other party he asserts a right under the Constitution of the United States, and necessarily this raises a Federal question. This is the assertion in the present case, and **the consideration which the Supreme Court of Pennsylvania gave it, demonstrates that it is not so far**

frivolous as to sustain a motion to dismiss. The motion is, therefore denied."

III.

The questions involved in this case, *i. e.*, the proper use of the Mortuary Fund, the right of the company to maintain that fund, and the extent of that right, were not open questions in the Minnesota court. They were settled by the Connecticut Court in the Dresser case. The corporation (plaintiff in error herein), which is merely a trustee for the certificate holder, is a Connecticut corporation. It is domiciled in that State. The directors reside in that State. The *locus* of the fund in question is in that State. The corporation, its officers and directors, and the fund are all within the jurisdiction of the courts of that State. The visitorial jurisdiction over the corporation is lodged in the courts of that State. The courts of that State are the proper courts to which the company, in its capacity as trustee, should apply for instructions and directions in the administration of its trust. In fact they are the only courts to which it can apply.

Cyc. Vol. 39, p. 315;
Lines v. Lines, 142 Pa. St. 149.

Any other rule would result in chaos. The case at bar well illustrates this. The Connecticut Court instructs the company to hold the fund in question to the extent of the average of the four preceding assessments, to-wit, $315,000.00, and that assessments may be levied **if the fund does not exceed** this amount and that assessments so levied are **legal assessments.** The Minnesota Court, on the other hand, holds that the entire fund must be paid out for death losses as they are in-

curred, and that an assessment levied when there is less than $315,000 in the Mortuary Fund is an **illegal** assessment. In other words, that the company is guilty of an "illegal" act in carrying out the instructions and directions of the Connecticut Court. The result is, if this decision stands, that an assessment good in one State is "illegal" and void in another. It is needless to dwell upon the dire confusion which would result. Suffice it to say that under such conditions it would be necessary to wind up the business, as the company could not conduct it with safety to itself, nor with justice to the certificate holders. The facts of this case furnish a striking illustration of the wisdom of the framers of the Constitution, in inserting therein Article IV, Section 1. While it is true that the Dresser case was not brought by the company, it is true also that one of the **objects of that suit was to obtain a judicial determination of the status of the fund in question and of the manner in which it should be treated.** To this extent at least it stands upon the same footing as a proceeding brought by trustees for the purpose of obtaining instructions and directions. **The duties of the company in the matter of the disposition of the fund constituted one of the issues in the case, and one of the issues determined by the Court.** The case was a peculiarly appropriate one in which to determine the status of the fund and the disposition which should be made of it. The Insurance Company, the Security Company, the trustees, and the directors of the Insurance Company were parties defendant. The plaintiffs, suing for themselves and other certificate holders similarly situated were twenty-nine in number, residing in fifteen different states, including Minnesota. All parties in in-

terest were before the Court in person or by representation, and the fund was within the jurisdiction of the Court. The whole question was carefully considered, and it was determined that the company should keep on hand, for use in the manner in which it had been used, the fund in question to an amount equal to the average of four preceding quarterly assessments, and that the excess over such amount only should be applied to the reduction of the next succeeding assessments. It goes without saying that this decision, until reversed, is binding in the State of Connecticut, upon the company, and upon all parties in interest who were properly in court, either personally or by representation, and must furnish the rule by which the company is to be guided in the disposition of the fund in question and in the levy of assessments to maintain and restore that fund. It is binding upon the certificate holders, *inter alia*, Herman Ibs, to whom was issued the certificate in suit, for the following reasons:

(*a*) It was not necessary that all or any of the certificate holders should be made parties. They were represented by the company, their trustee.

> Atlantic Trust Company v. Dana, 128 Fed., *l. c.* 222-224.

(*b*) The certificate holders were all in court by representation.

The doctrine of representation upon which this contention is founded is well settled. It is stated by this Court in Smith v. Swormstedt, 16 How. 303, in the following language:

> "Where the parties interested in the suit are numerous, their rights and liabilities are so sub-

ject to change and fluctuation, by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the Court.

"The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained."

See to the same effect:

Commissioners of Sewers v. Gellatly, 3 Ch. D. 610, 45 L. J., Ch. 788, 24 W. R. 1059;

McIntosh v. City of Pittsburgh, 112 Fed. 705, 707;

Dewey v. St. Albans, 60 Vt., *l. c.* 14;

Reid v. The Evergreens, 21 How. Prac., *l. c.* 321;

American Percheron Horse Breeders Assn. v. Importers' Association, 114 Ill. App. 139;

Reischick v. Klinelhoefer, 91 Mo. App. 434.

It is again stated by this Court, in Wallace v. Adams, 204 U. S., *l. c.* 425, in the following language:

"Now it is undoubtedly within the powers of a court of equity to name as defendants a few individuals who are in fact the representatives of a large class having a common interest or a common right—a class too large to be all conveniently brought into court—and make the decree effective not merely upon those individuals, but also upon the class represented by them. Mandeville v. Riggs, 2 Pet. 482; Smith v. Swormstedt, 16 How.

288; Bacon v. Robertson, 18 How. 480-489; United States v. Old Settlers, 148 U. S. 427-480."

The certificate holders, including Herman Ibs, clearly constituted a class within the definition given by this Court in Scott v. Donald, 165 U. S., *l. c.* 116:

> "The interest that will allow parties to join in a bill of complaint or that will enable the Court to dispense with the presence of all of the parties, when numerous, except a determinate number, is not only an interest in the question, but one in common in the subject-matter of the suit; such as the case of disputes between the lord of a manor and his tenants, or where several tenants of a manor claim the profits of a fair; or between the tenants of one manor and those of another; or in a suit to settle a general fine to be paid by all the copy-hold tenants of a manor, in order to prevent a multiplicity of suits. In all these and the like instances given in the books, there is a community of interest growing out of the nature and condition of the right in dispute; for, although there may not be any privity between the numerous parties, there is a common title out of which the question arises, and which lies at the foundation of the proceedings."

The decree in the Dresser case being binding upon certificate holders and company alike, so far as the question of the application of the fund in question is concerned, in Connecticut, is equally binding in Minnesota.

> "If a judgment is conclusive in a state where it is rendered it is equally conclusive everywhere."
> Cheeves v. Wilson, 9 Wall, *l. c.* 123.

> "By the settled construction of these provisions

of the Constitution and Statutes of the United States, a judgment of a state court, in a cause within its jurisdiction, and against a defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to as much force and effect against the person summoned or the property attached, when the question is presented for decision in a court of another state, as it has in the state in which it was rendered."

Hanley v. Donoghue, 116 U. S., *l. c.* 3.

"A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action and persons in privity with them, and cannot again be litigated in any future action between such parties or privies, in the same court or any other court of concurrent jurisdiction, upon the same or a different cause of action."

23 Cyc. 1215.

"Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, as a general rule, is regarded as binding in every other court."

Nations v. Johnson, 24 How. 195, 202.

Insurance Company v. Harris, 97 U. S. 331, 336:

"When a judgment or decree has been given in one state by a court having jurisdiction of the parties and the subject it has the same force and effect when pleaded or offered in evidence in the courts of any other state."

In Harris v. Balk, 198 U. S. 215, which was an action by a creditor against his debtor who had been garnished on such debt and paid it in Maryland, the Court said:

> "The State Court of North Carolina has refused to give effect in this action to the Maryland judgment. * * * If the Maryland Court had jurisdiction to award it, the judgment is valid and entitled to the same full faith and credit in North Carolina that it has in Maryland as a valid domestic judgment."

Huntington v. Attrill, 146 U. S. 657, 684:

> "This clause of the Constitution, like the less perfect provision on the subject in the articles of confederation, as observed by Mr. Justice Story, 'was intended to give the same conclusive effect to judgments of all the states, so as to promote uniformity, as well as certainty, in the rule among them'; and has these three distinct objects, first, to declare, and by its own force establish, that full faith and credit should be given to the judgments of every other State; * * * But when duly pleaded and proved in a court of that State, they have the effect of being not merely *prima facie* evidence, but conclusive proof, of the rights thereby adjudicated; and a refusal to give them the force and effect, in this respect, which they had in the State in which they were rendered, denies to the party a right secured to him by the Constitution and laws of the United States."

IV.

That the plaintiff in error in levying the assessment in question was acting within the terms of the decree in the Dresser case is apparent from the face of the

opinion of the Minnesota Court. Upon the 31st of March the Mortuary Fund amounted to $168,473.58, nearly $147,000.00 short of the amount authorized by the decree. Consequently there was no surplus over to be credited upon the assessment. It follows, *ex necessitate*, that had the Minnesota Court given full faith and credit to the Connecticut decree, and applied the rule laid down therein, upon the conceded facts in the case, it would have been compelled to hold the assessment regular, legal, and valid in all respects, and the non-payment thereof by Herman Ibs a complete defense to any action upon the certificate in question.

In other words, had full faith and credit been given to the Connecticut decree, had it been allowed the same force and effect that it had in Connecticut, the result would have been a judgment in favor of the plaintiff in error. The judgment in favor of defendant in error is due solely to the fact that the Minnesota Court not only did not give full faith and credit to the Connecticut decree, but refused to give it any credit whatever and refused to be in any manner bound or controlled by it.

V.

We desire now to discuss, very briefly, the questions involved in this case, on the basis that they were open questions in the Minnesota Court, and are not concluded by the decree of the Connecticut Court.

The Supreme Court of Minnesota is undoubtedly right in its statement that there is no question of fact involved. Upon the undisputed facts in the case the defendant in error was entitled to a judgment for the amount given her, or she was entitled to nothing. The Minnesota Court basis its decision solely upon the prop-

osition that the call or assessment in question was "illegal", and hence the fact of its non-payment, which fact is conceded, furnished no ground for forfeiture of the policy, nor for a defense to the action. It is conceded that the call or assessment was regular and in compliance with the conditions of the contract in all respects, and was for the proper amount, under those conditions. The alleged illegality arises from the fact (which is not disputed) that a portion of the amounts due for the one hundred and forty-five deaths enumerated in the list accompanying the call, to meet the losses on account of which said deaths the assessment was levied, had already been paid from the Mortuary Fund and that there was a balance in such fund sufficient to pay the remainder. This balance the Court holds should have been used for the payment of the remainder and hence, the Court reasons, there was no necessity for levying the assessment in question; that the proceeds thereof could only have been intended for use in the payment of future losses; that the company had no power to make an assessment for such a purpose, and hence the assessment in question was "illegal". It seems to us at least that this reasoning rests upon a misconception of the nature and terms of the contract, and of the nature and requirements of the business. It assumes that not only has the company no right to levy assessments save for deaths which have actually happened, but that it must apply the amounts collected on such assessments to the payment of the particular losses to meet which such assessments were levied, and cannot apply them to the payment of any other death losses; that, if we may use the expression, the payments received by the company, on each call or assessment, are ear-marked.

The agreement between the certificate holder and the company, evidenced by the certificates themselves (See Transcript of Record filed by defendant in error, pp. 52-56), contemplates nothing of the kind. The terms of the agreement are neither ambiguous nor uncertain. The certificate holders are to pay, thirty days after notice, upon **all certificates matured by death**, a sum to be determined by a defined ratio. The payments so made shall constitute, *i. e.*, **to form a "mortuary fund"** for the payment of **"all indemnity matured by deaths of members"**. The company upon its part agrees to pay, within ninety days after receipt of proof of death, etc., out of the "Mortuary Fund", and **"not otherwise"**, to the beneficiary of the certificate holder, the face of his certificate. Should the company fail to do this the Safety Fund is to be at once divided amongst the certificate holders, and the insurance is to terminate. Clearly the creation of a mortuary fund is provided in express terms, and it is clearly intended that the company shall so manage such mortuary fund that it shall be always able to meet the demands upon it, *i. e.*, to pay for each death loss within ninety days after receipt of proper evidence of its occurrence. This obviously was the view taken by the Supreme Court of Errors of the State of Connecticut (80 Conn. 681, 709), because it held, as heretofore stated, that the failure to pay an indemnity, after assessment made because of lack of funds, "the failure is that of the mortuary fund, and not of the insurance company". So that the existence of a mortuary fund is absolutely imperative to the continuance of this plan of insurance. Failure of that fund to respond to the demands made upon it automatically operates to terminate the insurance and necessitates a division of the "Safety Fund".

Such a mortuary fund was created in fact, and has always been maintained. The manner in which it attained its present proportions, in part at least, is sufficiently set forth in the opinion of the Connecticut Court quoted in the statement herein. It has always been used by the company for the purpose for which it was designed, to-wit, the payment of death losses, and has always been used in such manner to enable the company to pay death losses promptly and within the stipulated ninety days. It has varied necessarily from time to time in size, but has been and is sufficient in amount to enable the company to meet the necessary demands made upon it, and must always be so maintained if the plan of insurance is to be successfully worked out. This will be apparent upon the briefest consideration. The assessments were made quarterly. Thirty days were required to make up the assessment. Thirty days' notice of the assessment, when made up, was required. A second notice was given extending payment for twenty days. It will thus be seen that when the work of making up an assessment was begun some of the death claims would be ninety days old. When the assessment was completed some would be four months old. At the expiration of the thirty days' notice some would be five months old, and at the expiration of the second notice some would be five and a half months old. That is to say, should the company maintain no mortuary fund, before any money could by any possibility come in for the payment of the losses upon which a given assessment was based, the company as to two-thirds of such losses would be in default.

The facts in the case at bar furnish a perfect illustration of the necessity for the maintenance of the

Mortuary Fund. The assessment in question was made May 2nd. Its preparation was begun March 31st. On said last date the unpaid death losses, approved and unapproved, amounted to $339,666.67 (Transcript of Record, p. 81). The assessment was for one hundred and forty-five deaths (the last death being February 13th), amounting to $323,919.95. Of this amount there had been theretofore paid, from the Mortuary Fund, the proceeds of assessments levied for deaths prior to any of those embraced in this assessment, $198,994.19, leaving unpaid $124,925.76. There was at said date in the Mortuary Fund a balance of $168,473.58. The company, under the rule laid down by the Minnesota Court, should have paid out of the balance the $124,925.76 of losses embraced in the assessment, leaving in the fund $43,547.82. With this balance they should have paid a corresponding number of the remaining death losses, leaving unpaid $171,193.09. The company, notwithstanding the express terms of the certificate, should have levied no assessment whatever on account of the deaths thus paid for out of the Mortuary Fund, but should have levied an assessment sufficient only to cover the unpaid losses aggregating $171,193.09, although some of those claims were on March 31st forty-five days old, and would be, before any money could be received upon the assessment (June 1st) considerably more than ninety days old. The consequences which would have followed the adoption of such a course by the company are clearly stated by Mr. Lawrence, its secretary, in his testimony (Transcript, p. 41), in the following language:

> "If we had depleted the Mortuary Fund by paying all of the balance of the approved claims outstanding on March 31st unless we had levied the

assessment there would have been no money coming into that fund until September 1st. We had on March 31st outstanding death losses amounting to $138,000 over and above the approved claims. We would have had $138,000 of death losses if we had depleted the Mortuary Fund to pay all of the approved claims. Completed proofs of death on those were apt to come into the office every day and were coming in every day. It might be some of those claims would be approved because said papers were received on April 1st. Under the contract we would have been compelled to pay these claims ninety days from receipt of said proofs of death, which would have been on July 1st, and if there had been no money in the Mortuary Fund on that date those claims would not have been paid, the company would have defaulted in its payments and the Men's Division of the Safety Fund Department would have been wound up by the terms of the trustee's contract. In addition to these death losses of $138,000 that would have been outstanding March 31st if the Mortuary Fund had been used to pay all the approved claims we received, we were sure to incur death losses in April and in May. We could not tell what those losses would be; we knew about what the average would be, and those losses coming in April would probably be approved, and the ninety-day limitation expired on the majority before September 1st, and the same would be true in May."

The winding up of the Safety Fund Department, as there were outstanding certificates on March 31st to the amount of twenty-six million dollars (Transcript, p. 33), would have resulted in the receipt, in cash, through the distribution of the Safety Fund, by each certificate holder of a little less than four per cent of

the face of his certificate, and the loss of all benefits by the beneficiaries in such certificates. That the maintenance of the Mortuary Fund is not merely a convenience, but is a necessity, is so apparent that it "jumps at the eyes".

It may be well to call the attention of the Court to the fact that had the company pursued the policy indicated by the Minnesota Court in its opinion in this case, the defendant in error would have failed completely to realize any benefit from the certificate. The May assessment would cover only deaths occurring and reported prior to March 31st and would make no provision for those occurring in April and May, and thereafter, nor for those occurring prior to March 31st, but not reported prior to that date. The date for the next assessment was August 1st, for beginning the preparation therefor July 1st; for payment thereunder (first call) September 1st. It would include only deaths prior to July 1st. Herman Ibs died June 27th. Had the Safety Fund Department escaped winding up in May or June for failure on the part of the Mortuary Fund to meet the calls on it, and had the proofs, etc., of Herman Ibs' death been so promptly made up as to reach the company prior to July 1st so that the loss could have been included in the August assessment, neither of which things would have been at all probable, still before any money would have been payable upon the assessment (September 1st) the April death claims ($99,000.00) and the bulk of the May death claims ($121,000.00) would be more than ninety days old; in other words the company would be in default to the extent of, approximately, $220,000.00 and the Safety Fund would certainly be in the course of winding up.

Although we do not deem tenable the point made by

Court and counsel in this case in the court below that the company had no right to assess (for deaths which had actually occurred) to raise money for the payment of future losses, it may be as well to call attention to the fact that in this instance they did nothing of the kind. The preparation of the assessment was begun March 31st. It was completed and the thirty days' notice sent out May 2nd. It was payable (first call) June 1st. The conditions the company was bound to meet were the conditions existing June 1st when the money called for by the assessment should be actually paid. It was manifestly impossible to make the assessment and collect it on one day, June 1st. The company could, however, reasonably foresee, from the experience of former years, about what the conditions on that day would be. They in fact underestimated instead of overestimated the amount required. There were not any unpaid calls or assessments on March 31st (Transcript, p. 37), and hence there was nothing which could be added to the Mortuary Fund until June 1st. There would then be in the Mortuary Fund June 1st the proceeds of the assessment, $323,919.95 (provided it was promptly paid), plus the amount on hand March 31st, $168,473.58 or a total of $492,393.55. On June 1st the claims for death losses against the Mortuary Fund stood as follows: March 31st, $339,666.67; April (Transcript, p. 82), $99,000.00; May, $121,000.00; making a total of $559,666.67. In other words, the whole of the assessment in question, in addition to the amount in the Mortuary Fund March 31st, was in point of fact needed, and was inadequate to pay losses which had been incurred prior to the date at which it was payable.

The situation existing at the time the assessment under consideration was made, was due to the fact that

for some time preceding, the losses actually incurred had exceeded the assessments, and, for the purpose of equalizing the assessments as far as possible and avoiding the hardship which would be occasioned the certificate holders by unusually heavy assessments, the company had not assessed for the total losses incurred, but had carried some over into the next assessment (Transcript, p. 39). It is for this reason that most of the losses assessed for in this assessment were actually incurred prior to the date of the last preceding assessment, February 1st, only a small portion, to-wit, those from the 1st of February to the 13th of February, having been incurred since the last preceding assessment. It is for this reason also that the Mortuary Fund was reduced to $168,000.00. The company so far from levying assessments to cover future losses was endeavoring to levy enough to cover present losses. The whole proceeds of the assessment in question, plus what remained of the Mortuary Fund, were in point of fact insufficient to cover the losses actually incurred prior to June 1st the day when the assessment was payable.

We respectfully submit that the writ should not be dismissed, and that we should be given an opportunity upon final hearing for a full discussion and presentation of the questions involved.

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Supreme Court of the United States.

OCTOBER TERM, 1914.

THE HARTFORD LIFE INSURANCE COMPANY, HARTFORD, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

ELIZA IBS, DEFENDANT IN ERROR.

No. 213.

WRIT OF ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY, MINNESOTA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

THE SUIT

was instituted by Eliza Ibs, defendant in error, in the District Court of Ramsey County in the State of Minnesota to recover from the Hartford Life Insurance Company, plaintiff in error, $2,000.00, the amount of a certificate of insurance on the life of her husband. The Court directed a verdict in her favor. The Company

moved for a judgment, notwithstanding the verdict, or for a new trial, and from the order denying this appealed to the Supreme Court of the State, which affirmed the order of the District Court and remanded the case with directions to enter a judgment upon the verdict, and the case is brought here by writ of error to the District Court, sued out upon the ground that the judgment is in violation of Section 1, Article IV, being the full faith and credit clause, of the Constitution of the United States.

There is no question of mere pleading or procedure involved, and there is no controversy as to the facts of the case.

The Hartford Life Insurance Company

is a corporation of the State of Connecticut, which has its chief office in and whose officers and directors are residents of that State.

Under its charter it transacts the business of life insurance upon various plans, but this case is concerned only with its assessment plan, known as the "Safety Fund Department," and only with the Men's division of this department.

Under this plan the insured becomes a member of the Safety Fund Department, an insurer as well as an insured.

The Company began the Safety Fund Department in 1880 and it is still in operation, but since 1899 it has taken in no new members. There are now some 13,000 members (R. 29), and the amount of insurance in force is $26,000,000 (R. 30).

Certificate of Membership.

By his certificate of membership the insured agreed to pay, first, an entrance fee proportioned to the amount of his insurance; second, $3.00 per $1,000 annually as expense dues; third, $10.00 per $1,000 into a Safety Fund, and fourth, assessments, proportioned to the amount of the insurance and the age of the insured at the time of the assessment, into a Mortuary Fund to meet death losses.

The question in this case is directly related to the Mortuary Fund, but indirectly and consequentially, although necessarily, it involves also the Safety Fund.

The Mortuary Fund.

The provision of the contract as to assessments for the Mortuary Fund is for the

> "payment of all assessments proportioned to the maximum indemnity herein provided for, levied against the herein-named member to form *a Mortuary Fund for the payment of all indemnity matured by deaths of members,* which assessments to be levied upon all the members in the department wherein this certificate is issued whose certificates are in force at the dates of such deaths, shall be made according to the table of graduated assessment ratios given hereon, and as further determined by their respective ages and the aggregate maximum indemnity at the dates of such deaths, *with due allowance for discontinuance of membership.*" (R. 66.)

Also that

> "said company further agrees that the aforesaid Mortuary Fund shall be in no wise chargeable or liable for any use or purpose other than for the settlement of death claims, except as herein mentioned." (R. 67.)

The only provision in the certificate for any other use of the Mortuary Fund is for payment of the costs of collecting it (R. 68).

The Forfeiture Clause

of the certificate recites that

> "the member further agrees and accepts this certificate upon the express condition that if either the annual dues, assessments or Safety Fund deposit, as hereinbefore required, are not paid to said Company on the day due, then this certificate shall be null and void and of no effect, and no person shall be entitled to damages or the recovery of any moneys paid for protection while the certificate was in force, either from said Company or the trustee of the Safety Fund." (R. 69.)

Payment of Losses.

It is further provided that

> "ninety days from the receipt by the President or Secretary of said Company of satisfactory proofs, together with full information as to the manner and cause, of the death of the hereinnamed member while this certificate is in force, all the conditions hereof having been conformed to by the member, there shall be due and pay-

able, *out of the aforesaid Mortuary Fund and not otherwise,* the maximum indemnity of two thousand dollars (less the balance unpaid, if any, of the stipulated contribution to said Safety Fund, with fifty per cent added, together with any balance due said Company) to his wife, Eliza Ibs, if living otherwise to his legal representatives, upon presentation and surrender of this certificate properly receipted. All such payments to be made at the Home Office of said Company in lawful money of the United States." (R. 66.)

The Assessments

to meet expenses and the requirements of the Mortuary Fund, were levied quarterly. At the expiration of a quarter the sum necessary to meet its requirements was ascertained and an assessment made for this amount, and a notice sent to the certificate holders, together with a list of the deaths on which the assessment was based, and a statement of the amount due on account of such assessment by the certificate holder, and also a statement of the expense dues then owing by him, and a demand for payment.

Accumulations in the Mortuary Fund.

The assessment would never realize the full amount called, as not every policyholder would pay, and the policy itself provided for this contingency by authorizing "due allowance for discontinuance of membership." If the allowance thus made was larger than the actual number of lapses occurring, more money was received than was needed to pay the specified indem-

nities. If, however, the lapses were greater in number than contemplated, the amount of the assessment would be too small. The effort naturally was to make a sufficient allowance for lapses, and as a matter of fact the average allowance for lapses was greater than the actual lapsation, and so there was from this source an accumulation of money in the Mortuary Fund (R. 110).

It also appears that although the Company in practice levied assessments to cover the full amount of the face value of the certificate for each death during the previous quarter, they deducted from the face of the certificate a certain proportion of the assessment which would have been due from the member had he survived the quarter; that is, the proportion of the quarter which had elapsed at the time of his death. The sum so deducted went into the Mortuary Fund (R. 110).

These two sources of supply gave continuity to the Mortuary Fund. It was used by the Company always and exclusively for the payment of losses and because it was a continuous fund the Company was enabled to and did pay losses regardless of whether an assessment on account of the particular deaths had been levied or not. While the Company could, under the terms of the certificate, withhold payment in any case until ninety days after the receipt and approval by it of the proofs of loss, the usage was to pay losses as promptly as possible.

The Safety Fund

provision of the contract was to the effect that the amounts due to the Fund as provided by the Company

were to be turned over to another corporation, the Security Company, as Trustee, for investment. When the fund reached the sum of $300,000.00 its earnings, and when it reached the sum of $1,000,000.00, its earnings and all further contributions to it were turned over by the Trustee to the Insurance Company, and the Insurance Company in turn distributed the Fund so received among its outstanding certificate holders entitled thereto in proportion to the face value of their certificates, the distribution being made in the form of a credit upon the assessment for expenses and the Mortuary Fund. It was provided also that when the insurance under outstanding certificates should, by death or lapsation, be reduced to $1,000,000, the Safety Fund was to be distributed among the then certificate holders and the insurance terminated. (R. 118.)

The certificate also provided that if the Company

> "shall fail, by reason of insufficient membership, or shall neglect, if justly and legally due, to pay the maximum indemnity provided for by the terms of any certificate issued in said department, and such certificate shall be presented for payment to said Trustee by the legal holder thereof, accompanied by satisfactory evidence, as hereinafter provided, of its failure to pay, after demand upon it within the time herein stipulated for limitation of action, then it shall be the duty of said Trustee to at once *convert said Safety Fund* into money *and divide the same* (less the reasonable charges and expenses for the management and control of said Fund), *among all the holders of certificates then in force* in said department, or their legal representa-

tives, in the proportion which the amount of each of their certificates shall bear to the amount of the whole number of such certificates in force." (R. 72.)

Unless, therefore, there was always money in the Mortuary Fund to meet the payment of matured certificates, the Safety Fund Department, an essential feature of the plan of insurance, was subject to be wound up by the terms of the contract.

The Connecticut Case.

In 1906 there was a considerable accumulation of money in the Mortuary Fund; the exact amount does not appear from the record. In this year a suit was brought in the Superior Court of New Haven County, Connecticut, by some thirty certificate holders of the Company who were residents of different States, viz: Connecticut, Indiana, Florida, New York, Kentucky, Massachusetts, Michigan, Ohio, Minnesota, Georgia, Louisiana, Vermont, Illinois, Missouri and North Carolina, against the Company and its directors for the purpose, among other things, of compelling the Company to distribute the accumulation in the Mortuary Fund among the certificate holders. The suit was brought by the certificate holders in their own behalf and on behalf of other certificate holders similarly situated. It is entitled Dresser *et al.* vs. Hartford Life Insurance Company *et al.* It went to the Supreme Court of Errors of the State of Connecticut and is reported in 80 Conn. 681, the final result being a decree entered March 23, 1910, in the Superior Court of New

Haven County, which, so far as concerns this case, is as follows:

> "It was claimed by the plaintiffs that the defendants were levying assessments *unnecessary in amount* and number for their own *wrongful purposes.* The Hartford Life Insurance Company levied the assessments provided for in the plan and in the certificate above set forth, quarterly, and the proceeds of such assessments when received by said insurance company were paid into and credited to the Mortuary Fund described in the contract of insurance. The Hartford Life Insurance Company did not levy assessments *unnecessary in amount or number.* It appeared, however, that the allowance made for discontinuance of membership, although made in good faith, often exceeded the actual amount necessary to cover the deficiency in payments arising from such discontinuances, and that from that source margins of excess of payment arose from time to time, consisting of the difference between the aggregate amount actually received by said insurance company from such quarterly assessment, and the amount needed to pay the losses for the corresponding quarterly period. It also appeared that although the Company in practice levied assessments to cover the full amount of the face value of the certificates for each death during the previous quarter, they deducted an actual payment from the face of such certificates a certain proportion of the assessment which would have been due from the certificate holder had he survived the quarter, which sum is proportioned to the portion of such quarter which had elapsed at the time of the

death of such certificate holder, and there was, therefore, a margin arising from this circumstance between the amount of the losses paid and the amount of the losses assessed for. These margins accumulated from time to time in the hands of the Hartford Life Insurance Company in its Mortuary Fund, have always been and are now in constant use in the prompt payment of losses in advance of the receipt of the moneys to pay the same from the regular assessments, *by which receipts the said fund is constantly reimbursed.* Said accumulation of margins, although in constant use, are capable of exact determination in amount and now amount to many thousands of dollars.

"The plaintiffs claimed it was improper and wrongful to accumulate these margins and to carry this balance in said Mortuary Fund, and claimed that said balance of margins should be distributed amongst the outstanding certificate holders, *but it is held that it is proper and reasonable that the company should hold some such fund for the purpose of enabling it to pay losses promptly, but it is not necessary for that purpose that the company should hold more than the amount of one average quarterly assessment for the previous year.*

"Said Fund belongs to the certificate holders and is held in trust for them, and the Hartford Life Insurance Company has the right to hold the same, to the extent above stated, in trust for said certificate holders and for application to the settlement of death claims and said funds should be ultimately distributed in the settlement of death claims and as hereinafter pro-

vided, before said certificates, in accordance with their provisions, are extinguished, and the Safety Fund distributed in accord with the judgment of this court. Judge Shumway, presiding, above referred to. It is provided in the certificates that they are payable solely from the Mortuary Fund. It is also provided by the certificates and by the trust agreement hereinbefore referred to that on the distribution of the Safety Fund among the certificate holders, all liability on the certificates shall thereupon cease and determine." (R. 110 and 111.)

And it was accordingly

"Adjudged and decreed, that said Mortuary Fund of the Men's Division arising from the excess of the amount received for quarterly assessments over the amount necessary for the payment of losses for said quarter, as above described, or from any other source, together with all income or interest thereon, belongs to the certificate holders in the Men's Division of the Safety Fund Department, *and the insurance company is reasonably entitled to hold the same as a necessary and proper fund for the settlement of death claims on the certificates of insurance in said department.*

"Further, that in the future, any excess in said fund above the average of the four preceding quarterly assessments in said Men's Division of the Safety Fund Department of said Company shall be distributed to the certificateholders in diminution of assessments by crediting and applying such excess on account of the next succeeding assessment.

> "Also that *when* the amount of outstanding certificates of insurance in the Men's Division of the Safety Fund Department *falls to the face amount of one million dollars,* and the *Safety Fund is distributed* among the holders of said certificates, the balance, if any, of said Mortuary Fund remaining in the hands of the Hartford Life Insurance Company *shall be distributed pro rata among the certificate holders* whose certificates are outstanding *at that time.*" (R. 112 and 113.)

The Constitution and statutes of the State of Connecticut are in evidence (R. pp. 48 and 49), and show that the Superior Court was a court of competent jurisdiction to deal with the case before it.

The Mortuary Fund was, in fact, administered by the Company in accordance with the decree of the Connecticut court. At the time with which the present case is concerned, the amount in the Mortuary Fund was $168,473.58. The average quarterly assessment for the preceding year exceeded the sum of $300,000.00. (R. 57.)

The Ibs Case.

Herman Ibs, the husband of the plaintiff in error, was insured in April, 1885. He died June 27, 1910. On May 2, 1910, the Company levied an assessment upon its insured on account of the Mortuary Fund and expenses, which as to Ibs was "expense dues, $1.50; Mortuary Fund, $33.95." The assessment was payable on or before June 5, 1910. Ibs was duly notified and, in fact, was notified twice, but failed to pay any part of

the assessment. On June 29th, two days after her husband's death, Mrs. Ibs sent the amount of the call to the Company without notification of the fact of the death. The money was returned by the Company with a statement that the certificate had been cancelled on June 23d.

In the suit brought by Mrs. Ibs upon the certificate in the Minnesota court, the Company made defense upon the ground that Ibs had failed to pay the assessment referred to above and pleaded the adjudication by the Connecticut court in the Dresser case, as binding upon the Minnesota court as to the manner in which the Mortuary Fund was to be administered under the terms of the certificate of insurance upon which the suit was based.

The Minnesota court held the Connecticut decree to be immaterial; excluded it when offered as evidence in the case, and directed a verdict for the amount of the insurance with interest, and this action was approved by the Supreme Court of Minnesota.

Basis of the Minnesota Judgment.

The Minnesota judgment is based upon these facts, which are set forth in the opinion of the Supreme Court:

> "The call for the assessment was sent to the insured May 2, 1910. The notice states that the assessment 'is made to meet 145 deaths (as shown by accompanying list), benefits $323,-919.95.' The list accompanying the notice contained the names of 145 deceased members, the

claims of whose beneficiaries were included in the call and aggregated the exact amount of the assessment, together with the dates of their deaths, beginning September 28, 1909, and ending February 13, 1910.

"The assessment was based upon conditions and data existing as of the date March 31, 1910, and its preparation was begun April 1st. On March 31st the Mortuary Fund, made up from the accumulations of prior assessments, amounted to the sum of $168,473.58. Of the death losses to pay which the assessment was levied, and stated in the call, aggregating $323,919.95, there had been paid prior to March 31st $198,994.19, leaving $124,925.76 unpaid, a sum less by $43,547.82 than the balance then in the Mortuary Fund. It is plain, therefore, that all of the death losses, to pay which the assessment in question was levied, could have been paid out of this Mortuary Fund, without levying the assessment, and a balance of over $43,000 left in the fund. We think it clear that the necessity for this assessment and its validity must be determined by the condition of the so-called Mortuary Fund on March 31st, and the amount of the death losses, to pay which the assessment was levied, according to the notice sent to members. There were some death losses at that date which, though not used as a basis for arriving at the amount of the assessment, and not mentioned in the call, had been reported to defendant, and part of them approved. We hold that these should not be considered. The assessment was not levied to pay such losses, but only the losses stated in the list accompanying the notice. Death losses

not included in this list were included in subsequent assessments." (R. 133-134.)

That is to say, the Minnesota court held that if a loss had been paid out of the Mortuary Fund there could be no rightful assessment to reimburse the fund therefor, and as to unpaid losses, if there was money in the fund, this must first be used to discharge them before an assessment was resorted to. In other words, the Company could not maintain a Mortuary Fund as a continuous fund for the payment of losses in advance of the collection of an assessment made on account of them.

The record shows (pp. 41 and 120) that on March 31, 1910, death losses amounting in round numbers to $540,000 had been incurred for which assessments had not previously been made. Of these, however, in round numbers, $200,000 had been paid out of the Mortuary Fund. The call for the assessment was not sent out until May 2d, and payments were not due until June. During April additional losses to the extent of $99,000 were incurred, and during May $121,000. So, in June, as payments of the assessment came in, there were outstanding unpaid losses in the round sum of $560,000, and to meet these the assessment, if fully paid, of $323,-919.95 and the amount still in the Mortuary Fund of $168,473.58, or a total of $492,393.33, or about $68,000 less than the unpaid losses. This we cite to show that the Mortuary Fund was not maintained at an excessive amount, for it was so much short, after being replenished, of the outstanding unpaid losses.

As to the decrees of the Connecticut court, the Supreme Court of Minnesota said:

> "We are not able to see how these decrees have any material bearing on the issues in the case at bar, much less how they are controlling. The issues here are vitally different from those in the Dresser litigation. There was no question there of a forfeiture, nor of the legality of an assessment levied to pay specified death losses, when the balance in the Mortuary Fund was ample to pay all such losses. The right to hold a balance in the Mortuary Fund was affirmed, but not the right to forfeit a policy for non-payment of an unnecessary assessment. Neither the issues or the parties were the same as in the case at bar. The decrees are not even authority against plaintiff's contentions here; much less are they binding on the principle of *res adjudicata,* or estoppel by judgment." (Record, pp. 138 and 139.)

So the Company submits that the Minnesota court did not give full faith and credit to the judicial proceedings in Connecticut, the decree in which it is insisted was binding upon the Company and all its members.

ASSIGNMENTS OF ERROR.

Various assignments of error are made in the record, the first and second of which present the substantial question in the case. (R. pp. 4 and 5.)

> "First—The said District Court of Ramsey County, Minnesota, failed and refused to admit in evidence a decree of the Superior Court of New Haven County, Connecticut, in the case of Dresser and others vs. the Hartford Life Insurance Company and others (Curtis, J.), duly exemplified under and in accordance with the acts of Congress, in which case there was involved and decided a controlling fact material to the determination of this cause, to which ruling the defendant then and there duly excepted, and which said ruling of said District Court was affirmed by the Supreme Court of the State of Minnesota, and by which ruling the Court failed to give full faith and credit to such decree as is required by Article IV, Section 1, of the Constitution of the United States, and by which ruling the Court violated Article I, Section 10, of the Constitution of the United States forbidding the passing of any law impairing the obligation of contracts."
>
> "Second—The said District Court of Ramsey County, Minnesota, also failed and refused to admit in evidence another decree of the Superior Court of New Haven County, Connecticut, in the case of Dresser and others vs. the Hartford Life Insurance Company and others (Shumway, J.)

duly exemplified under and in accordance with the acts of Congress, in which case there was involved and decided a controlling fact material to the determination of this cause, to which ruling the defendant then and there duly excepted and which ruling of the District Court was affirmed by the Supreme Court of the State of Minnesota and by which ruling the Court failed to give full faith and credit to such decree as is required by Article IV, Section 1, of the Constitution of the United States, and by which ruling the Court also violated Article I, Section 10, of the Constitution of the United States forbidding the passing of any law impairing the obligations of contracts, as will appear from the following parts of the record in said case."

PROPOSITIONS AND AUTHORITIES.

I.

The issue as to the right and propriety of maintaining a Mortuary Fund was involved in both the Connecticut and the Minnesota cases.

Southern Pacific Co. v. U. S., 168 U. S. 1.
Klein v. Insurance Co., 104 U. S. 88.

II.

The plaintiff in the Minnesota case stood as to the Connecticut case in privity with her husband, and he was by representation a party to the Connecticut case.

Smith v. Swormstedt, 16 How. 288.
Wallace v. Adams, 204 U. S. 415.
2d Perry on Trusts, Sec. 885.
2d Beach on Trusts, Sec. 498.
Scott v. Donald, 165 U. S. 116.

III.

The Connecticut court was a court of competent jurisdiction to determine the question of the right of the Company to maintain the Mortuary Fund, and its decree was binding upon the Company and all its members.

Condon v. Mutual Reserve, etc., 89 Md. 99.
Clark v. Mutual Reserve, etc., 14 Appeals D. C. 154.
Taylor v. Mutual Reserve, 97 Va. 60.
State *ex rel.* v. Shain, 254 Mo. 78.

IV.

The Minnesota court did not give full faith and credit to the judicial proceedings in Connecticut, and refused to give any effect whatever to the decree of the Connecticut court.

Nations v. Johnson, 24 How. 195.
Huntington v. Attrill, 146 U. S. 657.
Insurance Co. v. Harris, 97 U. S. 381.
Harris v. Balk, 198 U. S. 215.
Selig v. Hamilton, —— U. S. —— (decided June 22, 1914).

ARGUMENT.

I.

The Issues.

We have to deal with a life insurance company doing business upon the assessment plan, with a Safety Fund attachment designed to protect it against the hazards incident to that plan. The insured are also the insurers, are designated and are in fact members of the Company. Its way of meeting its losses is periodical assessment of its members, which, if not voluntarily paid, cannot be enforced, the sole remedy of the Company in case of non-payment being forfeiture of the membership.

An assessment, limited precisely to the amount of the losses for the payment of which it is levied, will not bring in enough to meet its own requirements. Some members will have died before it is payable, and some will not pay, and will rather forfeit their membership. So there will be a deficiency, and because of this there must be immediate re-assessment or postponement of payment of acknowledged liability until the next regular assessment is made.

In the business of such a company there will be contested claims of losses and sometimes judgment upon them adverse to the Company, and if it pays only out of assessments levied to meet specified claims, executions will be levied upon its property, and as a conse-

quence its Safety Fund and business generally will be endangered, for the judgment creditor is not bound to wait upon the slow process of periodical assessments.

In the business of life insurance generally, and in such business done upon the assessment plan particularly, many cases present themselves of claims which press urgently for prompt payment and in which it is peculiarly true that he gives twice who gives quickly.

It is out of possibility to conduct such a business efficiently and beneficently if no death loss may be paid except out of the proceeds of an assessment levied after the loss has been incurred and proven and which includes that loss specifically. To make assessments frequently involves needless expense. To postpone payment until assessments made at remote intervals are collected works hardship and privation in many cases. So assessments should not be too frequent and means for prompt payment in needy cases should be provided.

Here assessments were made quarterly, sent out on the 2d days of February, May, August and November, payable thirty days or more thereafter, according to the residence of members. To make such an assessment requires time, and it cannot include all claims approved at its date. It must be apportioned to the amount of the insurance of each member and to his age at the time of the assessment. The record shows that the assessment which Ibs failed to pay was made with respect to conditions and data ascertained as of March 31, 1910 (R. 53), and did not include all the losses which had been approved at that date. Making proofs of loss and passing upon them requires time.

So if there is no fund which may be drawn upon currently, payment of losses which should be made promptly as possible would in many cases inevitably be postponed from three to six months and even longer.

To meet this condition of affairs the parties provided in the agreement of membership, not that losses should be paid out of the proceeds of assessments levied specifically to meet the particular losses, but out of a *Mortuary Fund to form which assessments were to be levied,* with no restriction or limitation that the proceeds of each assessment must be applied exclusively to the payment of the losses on account of which that assessment was made. On the contrary, the indemnity is in every case "due and payable out of the aforesaid Mortuary Fund," whether an assessment has been levied on account of it or not.

The terms of the certificate—that there shall be "assessments proportioned to the maximum indemnity herein provided for, levied against the herein-named member *to form a Mortuary Fund* for the payment of all indemnity matured by the deaths of members"; that the amount of an approved loss "shall be due and payable *out of the aforesaid Mortuary Fund* and not otherwise," and that "*aforesaid Mortuary Fund* shall be in no wise chargeable or liable for any use or purpose other than for the settlement of death claims"—all imply a fund that is continuous, which may be drawn upon continuously to meet demands which arise, not periodically, but continuously and literally from day to day, for the calls in evidence show an average of practically a death per day.

The primary and usual significance of the word "fund" is of something continuous. The Century Dictionary defines it to be "a stock or accumulation of money or other forms of wealth devoted to or available for some purpose, as for the carrying on of some business or enterprise, or for the support or maintenance of an institution, a family or a person; as a sinking fund, the funds of a bank or corporation." That this is the significance of the term as used in the certificate is emphasized by the nature of the business to which it is related. The supply of the fund is periodical, once every three months, but the demand upon it is a daily one urgent to be met daily. That these urgent daily demands be not postponed, payment of them must precede assessment and collection on account of them. And such was the usage of the Company. The particular assessment, for non-payment of his share of which Ibs' policy was forfeited, aggregated $323,919.25, but of the losses specified much the greater part, $198,-994.19 had already been paid. This assessment and every other assessment was not principally to pay the losses on account of which it was levied, but to replenish the Mortuary Fund, which had been greatly depleted by the previous payment of those losses.

The right to maintain this fund was directly challenged by the plaintiffs in the Dresser suit. They said that the Company was making unnecessary assessments as attested by the fact that there was money in the Mortuary Fund, more than was required to pay unpaid losses on account of which assessments had been made and collected, and they asked the Connec-

ticut court to turn this surplus back to them and to their fellow-members, which might be done either by direct re-payment or by credit upon the next assessment.

If this was once done there would be no means thereafter of paying a loss until after assessment had been made on account of it and the assessment collected. There would be no Mortuary Fund, as a continuous fund, for each quarterly assessment as it was collected must be at once disbursed to pay the losses on account of which it was levied, and the losses meanwhile incurred must wait until the next collection day.

The suit in the Connecticut court was to enforce just this mode of conducting the business of the Company. True, the plaintiffs there alleged that the officers of the Company "were levying assessments unnecessary in amount and number *for their own wrongful purposes.*" But they did not mean by this that the officers designed to embezzle the Mortuary Fund, but only that they had no right to maintain it. The Court found that the accumulations in the fund "*have always been and are now in constant use in the prompt payment of losses in advance of the receipt of the moneys to pay the same from the regular assessments, by which receipts the said fund is constantly reimbursed.*" None the less, Dresser and his associates persisted in the demand for a distribution of the fund.

The Court held that it was reasonable and proper that the Company should maintain such a fund for such a purpose, but that it was not necessary to keep in the fund more than the amount of one average quar-

terly assessment. This would be about three hundred thousand dollars.

The fund, the Court decided, belonged to the members and was *held in trust* for them by the Company, but decided also that the Company *"has the right to hold the same, to the extent above stated, in trust for said certificate holders and for application to the settlement of death claims,"* and so decreed that only when the accumulation exceeded the average quarterly assessment and then only to the extent of such excess it should *"be distributed to the certificate holders in diminution of assessments by crediting and applying such excess on account of the next succeeding assessment."* And

> "Also that when the amount of outstanding certificates of insurance in the Men's Division of the Safety Fund Department falls to the face amount of one million dollars and the Safety Fund is distributed among the holders of said certificates, the balance, if any, of said Mortuary Fund remaining in the hands of the Hartford Life Insurance Company, shall be distributed *pro rata* among the certificate holders whose certificates are outstanding at that time."

The fund was to be maintained so long as the Company continued in business and was to be fully liquidated only when the business was brought to a close.

What was the subject matter of this suit and this decree? It was the Mortuary Fund. The plaintiffs attacked the fund. True, they would get, if they succeeded, the specific money then in the fund, but to do

that they must destroy the fund. And in its decree the Court dealt not with the specific money in the fund, but with the fund itself. The decree holds it to be proper, right, reasonable and necessary, and provides for its continued maintenance and for the disposition of its remains when the insurance is all liquidated.

The adjudication by the Connecticut court involved a construction of the contract between the Company and its members. It could not be right, reasonable, proper or necessary to maintain the fund if the contract of membership did not warrant it. The decree settled as a matter of reciprocal right and obligation of the Company and the certificate holders, that it was right, proper and necessary on the part of the Company to maintain the fund and to replenish it by assessment periodically when it was depleted by payment of losses and as a necessary consequence that it was right and proper and necessary on the part of the certificate holder to pay those assessments as they were levied. If the decree was operative only upon the Company and not upon the certificate holder, then it was not operative at all, for in such case it decreed that the Company had the right to demand of the insured what he had the right to refuse, and that it had the right to do, what he had the right to prevent it from doing.

What was the issue in the pending suit, and what did the Minnesota court decide therein?

The suit was upon the certificate of membership to collect the amount of insurance provided for therein. The defense was that the certificate had been cancelled and that this cancellation was warranted, justi-

fied and required by the Connecticut decree. The reply to this was that the cancellation was a void act and that the Connecticut decree had no relevancy to the case.

What are the facts? The cancellation was made for failure to pay assessment No. 127. The failure to pay was admitted. But said the Minnesota court, the Company had no right to levy the assessment; it was "unnecessary and illegal," and so failure to pay it was not a ground for forfeiting membership. And why was the assessment held to be unnecessary and illegal? Because part of the losses on account of which it was levied had previously been paid out of the Mortuary Fund and as to those which had not been paid, there was money enough left in the fund to meet them.

Of course, if this assessment was illegal and unnecessary as to Ibs, it was so as to every other member and the Company must alter the administration of its affairs accordingly. Its next assessment would be in effect not upon its members, but upon the Mortuary Fund and would exhaust it, and thereafter the fund would consist of periodical collections to pay losses previously incurred, disbursed as soon as received. There would be an inflow of money every three months and an immediate outflow, and for the intervening time the fund would be dry.

The form of the action in the Minnesota case was very different from that in the Connecticut case, but that is not to the purpose.

This Court said in Southern Pacific Company vs. United States, 168 U. S. 1, *l. c.* 48 and 49, that

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

What right, question or fact was in issue in the Connecticut case? The right to maintain a Mortuary Fund, to pay losses out of this fund in advance of assessment therefor, and to maintain the fund for that purpose and replenish it from assessments so long as the Company continued in business.

What right, question or fact was in issue in the Minnesota case? Whether Ibs was still a member of the Company at the time of his death. He was a member if he had paid all lawful assessments. If he had failed

to pay any lawful assessment he was not a member, for this Court said in Klein vs. Insurance Co., 104 U. S. 88, *l. c.* 91:

> "The provision, therefore, for the release of the Company from liability on the failure of the insured to pay when due is of the very essence and substance of the contract of life insurance. To hold the Company to its promise to pay the insurance, notwithstanding the default of the assured in making punctual payment of the premiums, is to destroy the very substance of the contract."

Ibs did not pay assessment No. 127. Why, then, was not his membership forfeited? The Minnesota court answers that the assessment was illegal, because, first, it was levied in part to reimburse the fund on account of losses previously paid out of it; and second, because there was money in the fund sufficient to pay the unpaid losses listed in the assessment, and this should have been used for that purpose.

The Connecticut court, on the other hand, had decreed that it was right to reimburse the fund for losses paid out of it, and only when there was "any excess in said fund above the average of the four preceding quarterly assessments" should the fund "be distributed to the certificate holders in diminution of assessments *by crediting and applying such excess on account of the next succeeding assessment.*"

Confessedly, there was no such excess, and so that which the Connecticut court held was right to be done by the Company under the contract of membership, the Minnesota court held to be wrong.

Connecticut said to the Company, you may keep $315,000 in the Mortuary Fund. Minnesota said, because you had $168,000 in that fund, your assessment was illegal.

Precisely the same proposition was decided in both cases.

Precisely opposite conclusions were arrived at in each case.

What was held to be *legal* in Connecticut was held to *illegal* in Minnesota.

The Connecticut decrees undeniably established:

First—That the Mortuary Fund is a *trust fund* held by the Company as trustee for the benefit of the certificate holders, *cestui que trustent.*

Second—That the *situs* of this trust fund is Connecticut.

Third—That the Mortuary Fund should be administered in accordance with the *authority* and *directions* given by the chancellor to the Trustee.

Fourth—That these included the *direction and authority to maintain in said fund a sum equal to the average of one* quarterly assessment for the preceding year.

The effect which this judgment and decree had in the State of Connecticut was to *legalize* the retention by the Company in the Mortuary Fund of a sum equal to one quarterly assessment ($315,000).

The Minnesota court held, quite to the contrary, that although there was in the Mortuary Fund less than one

quarterly call ($168,000), the assessment in question was illegal.

We submit that in thus holding that the existence of $168,000 in the Mortuary Fund invalidated the assessment the Minnesota court necessarily held that the Company, the trustee, had no power, no right, to retain this sum in the Mortuary Fund, and therefore necessarily repudiated and refused to follow the previous decree of the Connecticut court which authorized the trustee to maintain in that fund a sum not to exceed $315,000, and as the prior decree of Connecticut was made by a court which had jurisdiction of the *res* (the trust fund being then and now in Connecticut) and of the *parties in interest* (of the plaintiff, through representation), the Minnesota court failed and refused to give full faith and credit to the judgment and decree of a sister State as commanded by the Constitution of the United States.

II.

The Parties.

Another reason stated by the Minnesota court for not giving effect in the case before it to the Connecticut decree, is that the parties in the two suits were not the same.

Literally speaking, this is true. Mrs. Ibs was not a party either as plaintiff or defendant in the Connecticut case, nor would she have been admitted as a party in Connecticut if she had applied. Her husband was living when that suit was brought, while it was pend-

ing and when it ended. He was the person interested in the proceeding and he was the person to be made a party.

The suit was in equity, the charge was of a maladministration of a trust fund. The subject matter was peculiarly one for the jurisdiction of chancery. All the trustees, the Company and its officers, were made parties defendant. On that side of the case the representation was complete, unless the trustees failed to make defense in good faith. If there was fraud or collusion, if the defense was a mere pretense, a beneficiary of the trust should have been admitted as a party defendant. But there is no charge of that kind here.

The issue in that case was as to the Mortuary Fund. The plaintiffs there asserted that this fund as it existed at any time belonged to them ratably with their associate members, and that it should be distributed among them. The trustees insisted that the fund was and should be held by them as a trust fund for the beneficiaries applicable to and used for the payment of death losses in advance of assessment for losses. Some of the members were undoubtedly of the same view, desiring that in case of their own death, their insurance should be paid in advance of assessment therefor and their families promptly relieved.

If Ibs stood with the trustees in their administration of the Company's affairs he certainly was represented in the suit and the decree therein is as binding upon him as upon the trustees. (2d Beach on Trustees, Sec. 498.) But let us assume that he stood upon the

other side of the contention. In such case he was a party through representation by the thirty members who were plaintiffs, who asserted that the maintenance of the Mortuary Fund was in mal-administration of the trust estate. The issue as to this was single. The fund either should, or should not, be maintained as a continuing fund.

There were thirteen thousand beneficiaries, and obviously all could not be joined. The suit was by thirty of them, "in their own behalf and for the benefit of other creditors and certificate holders in similar situation as themselves," and this gave to any one in like case the right to join as plaintiffs.

The rule as to parties by representation was thus set forth by this Court in Smith vs. Swormstedt, 16 How. 288, *l. c.* 303:

> "Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would ofttimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, *and the decree binds all of them the same as if all were before the Court.* The legal and equitable rights and liabilities of all being before the court *by representation,* and especially where the subject matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.

"The case in hand illustrates the propriety and fitness of the rule. There are some fifteen hundred persons represented by the complainants, and over double that number by the defendants. It is manifest that to require all the parties to be brought upon the record, as is required in a suit at law, would amount to a denial of justice. The right might be defeated by objections to parties, from the difficulty of ascertaining them; or if ascertained, from the changes constantly occurring by death or otherwise."

And in Scott vs. Donald, 165 U. S. 107, *l. c.* 116, it was said:

"The interest that will allow parties to join in a bill of complaint or that will enable the Court to dispense with the presence of all of the parties, when numerous, except a determinate number, is not only an interest in the question, but one in common in the subject-matter of the suit; such as the case of disputes between the lord of a manor and his tenants, or where several tenants of a manor claim the profits of a fair; or between the tenants of one manor and those of another; or in a suit to settle a general fine to be paid by all the copyhold tenants of a manor, in order to prevent a multiplicity of suits. In all these and the like instances given in the books, there is a community of interest growing out of the nature and condition of the right in dispute; for, although there may not be any privity between the numerous parties, there is a common title out of which the question arises, and which lies at the foundation of the proceedings."

The rule as laid down in these cases was approved also in the recent case of Wallace vs. Adams, 204 U. S. 415.

It is peculiarly applicable in cases involving trust relations in which many persons are interested.

Perry, in his work on Trusts, 2d Vol., Sec. 885, says:

> "Where the parties in interest are so numerous that it is not possible or convenient to join all as plaintiffs, the Court will allow a few *cestuis que trust* to sue in behalf of themselves and the others; so a small number may be made defendants as representatives of all the others for the purpose of determining their rights; but in such cases all the trustees must be joined. If all the *cestuis que trust* must join in a conveyance, they should all join in the suit, otherwise the litigation might be futile; but in the absence of any, the Court will proceed to bind the rights of all if possible. In order that a few may sue, or be sued, in behalf of a large number, it must appear that all have the same beneficial interest; for if they have different or conflicting interests, they must all be brought before the court, in order that their separate interests may be adjusted."

Do we meet all the requirements of the rule?

As to the number of persons interested and the great expense, difficulty and impracticability of making them all parties, there can be no question. There were thirteen thousand members, among them residents of nearly every State in the Union. It would not only be expensive and difficult, but it would be impossible to join them all.

Who were made parties? As defendants, the Company and its officers, all who could be joined on that side. As plaintiffs, thirty members, including residents of fifteen different States.

What interests were represented? Only two interests existed, that of the Company and that of the members. The legal and equitable interest of the Company was determinable by its duty, which was to administer the business and affairs of the Company rightfully and legally. The interest of the plaintiffs was in reality the same.

The issue presented and involved in the case was single. It was as to the Mortuary Fund. Should it be maintained as a continuous fund, or should it be discontinued as such? The plaintiffs asked that it be discontinued and the money in it paid to them and their associate members. The defendants asked that the fund be maintained. The question arose under the contract of membership and was the same question as to each and every member, for the contract was the same in each and every case, and either did or did not admit of the maintenance of a continuous fund. Both sides of this single proposition, the affirmative and the negative, were represented, the affirmative by the defendants and the negative by the plaintiffs. Ibs was represented either by the plaintiffs or by the defendants.

In the general interest of the trust estate, was it right and proper to maintain such a fund in such a way? The plaintiffs asserted the one view and the defendants

the other, and again Ibs was represented by the one side or the other.

There could not be a decision one way as to some of the members and a decision to the contrary as to others.

Assessments as against members must be equal, age and amount of insurance carried considered. There could not be an assessment against one and not against another. The Minnesota court held that there could be no legal assessment on account of losses previously paid, nor on account of unpaid losses so long as there was any money in the Mortuary Fund. If this was true as to Ibs, it was true of every member of the Company, and if it was true as to this one assessment, it was true of every assessment made on account of losses previously paid or while there was money in the Mortuary Fund. Indeed, the Missouri Court of Appeals so held in Johnson vs. Hartford Life Ins. Co., 166 Mo. App. 261, where for five years, or a period of twenty assessments, the insured had failed to pay anything, and yet a recovery was allowed upon his certificate on the ground that the company had no right to maintain the Mortuary Fund for the payment of losses in advance of assessments.

Such a fund could not be maintained as to some of the members without maintaining it as to all. It could not be done legally, for the terms of the contract were the same as to all, and so necessarily were the rights and obligations of the contract. It could not be done practically, for against the non-assenting members no assessments could be levied so long as the fund was

maintained, and the assenting members must bear the whole burden of the insurance of all.

Every requirement of the rule of party by representation was fully met here.

III.

The Force and Effect of the Connecticut Decree.

The Superior Court of New Haven County, Connecticut, was a court of general jurisdiction at law and in equity and had jurisdiction of the Dresser suit. This was really not denied by the Minnesota courts, which both based their judgment on the ground that the issues and the parties in the two cases were not the same. It is none the less incumbent upon the appellant here to show that the Connecticut court had jurisdiction of the suit and jurisdiction to enter such a decree as it did.

The Hartford Life Insurance Company was a Connecticut corporation, chartered by the laws of that State, doing business and maintaining its principal office there. The Company, alike because of its corporate charter and because of the high trust involved in its business, was subject to the jurisdiction of the courts of equity of that State.

The question was elaborately considered in Condon vs. Mutual Reserve Fund Life Association, 89 Md. 99, *s. c.* 44 L. R. A. 149. The Company was a corporation of the State of New York and the suit was brought in Maryland. It was held that a suit involving the conduct of its business by a corporation was peculiarly

one for the courts of the State which had created it and where the suit had in view regulating the administration of its internal affairs, it was exclusively for those courts. The Maryland court declined jurisdiction because the matters complained of, and they included the propriety of the amount of the assessment levied, did not affect the appellant's individual rights solely. "They," said the Court, "relate also to the rights and bear upon the liabilities of every other member as an insurer; and while they may, by their consequences, affect him individually as assured, they do not affect him exclusively, but concern, as well, the internal management of the company. His relation to the corporation is, as we have stated, of a two-fold character. He is insurer and insured. It is possible that the same act of the body corporate may affect both of these relations. In that event, it could not be said that the act affected a member's individual rights only."' (44 L. R. A. 155.) See, also:

Clark v. Mutual Reserve Co., 14 Appeal cases D. C. 154.
Taylor v. Mutual Reserve Co., 97 Va. 60.
State *ex rel.* v. Shain, 245 Mo. 78.

The maintenance of the Mortuary Fund was distinctively a matter of internal administration. It was accumulated from two sources, one the excess of allowance for lapses over the actual lapsation when the amount of an assessment was determined; the other was the deduction made from the face of the certificate when losses were paid of an amount related to the por-

tion of the quarterly period which had elapsed when the member died. All the members contributed, and in due proportion.

Now, as the Mortuary Fund was depleted from time to time by the advance payment of losses, it was replenished by assessments, but the accumulation, the fact that there was a constant fund, was due to the two sources of supply mentioned.

No individual member had a distinctive right to this fund, and the accumulation of it was due to the way in which the affairs of the Company were administered, a way pursued without question from 1880 to 1906, and then challenged in the Dresser case.

Whether now the Company must cease this way of administering its affairs and distribute the fund presented a question exclusively for the cognizance of the Connecticut courts. But we need not insist upon this. Certainly it was a question proper for determination by some court, and if by any court of general equitable jurisdiction in any State in which the Company did business, it was yet one for the jurisdiction of the Superior Court of New Haven County, Connecticut.

Dresser and his associates said that they and their fellow-members had a right to the fund and demanded a distribution of it. The Court decided that they had no such right, but that the fund was a proper one, proper to be accumulated, proper to be used in the advance payment of losses and when depleted thereby, proper to be replenished by assessments on account of those losses. The Court had jurisdiction to decide upon the questions presented and all the parties and

interests involved being before it, directly or by representation, all were bound by its decision, and that decision was entitled to full faith and credit in every court and in every form of action in which that question arose.

IV.

Full Faith and Credit Were Not Given to the Connecticut Decree.

Ibs being before the Connecticut court by representation, its decree had the same effect upon him and upon the beneficiary of his certificate as if he had joined in the suit as plaintiff. What, then, would be the status of the matter? In the Dresser case he had asserted that the money in the Mortuary Fund was his, individually, and that of his fellow members, each entitled to his proportion. The Company, he said, had no right to pay losses out of it, but must pay it to the members, to each his proper share. This was adjudged against him.

In the present case the party asserting his rights of membership, asserts again as he did in the Dresser case, that the Mortuary Fund was his individually and that of his associate members; that it was not applicable to the advance payment of losses, but should be paid to him and his associate members in discharge or reduction of the next assessment levied and which could be levied only to meet losses which had not previously been paid.

"The right to hold a balance in the Mortuary Fund," says the Minnesota court, speaking of the Connecti-

cut decree, "was affirmed, but not the right to forfeit a policy for non-payment of an unnecessary assessment."

This statement of the Minnesota court is a self-contradiction. To say that the assessment was unnecessary is to deny "the right to hold a balance in the Mortuary Fund."

The question of forfeiture was involved in both cases, for forfeiture of membership is a mere consequence of the non-payment of a legal assessment. A balance could not be maintained in the Mortuary Fund if it could not be replenished, and if no assessment could at any time be levied if there was money in that fund. The Minnesota court dealt with the fund as immediately, and all of it, applicable, and as bound to be applied, in payment or reduction of an assessment to meet accrued unpaid losses. It was not legal in its view to levy an assessment in anticipation of future losses, nor to levy one on account of losses already incurred and paid. And losses incurred, but unpaid, must be paid out of the Mortuary Fund so far as it would reach. Conceding the right to maintain a Mortuary Fund to have been decreed by the Connecticut court, the Minnesota court, by its judgment, denied the right to any and every means necessary to maintain that fund. This fund, so dealt with, if it could find voice, might well say:

> "Nay, take my life and all; pardon not that.
> You take my house when you do take the prop
> That doth sustain my house; you take my life
> When you do take the means whereby I live."

The express adjudication of the Connecticut court that the Mortuary Fund may be maintained up to the average of the four preceding assessments and that only the excess above this is to be applied in reduction of an assessment, was absolutely disregarded by the Minnesota court, for it held an assessment to be illegal and unnecessary which, under the express terms of the Connecticut decree, was right and proper and necessary.

So full faith and credit was not given to that decree, for no faith or credit was given to it.

In Nations vs. Johnson, 24 How. 195, *l. c.* 202, the Court said:

> "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, as a general rule, *is regarded as binding in every other court.* Whenever the parties to a suit and the subject-matter in controversy between them are within the regular jurisdiction of a court of equity, the decree of that court is, to every intent, as binding as would be the judgment of a court of law."

In Huntington vs. Attrill, 146 U. S. 657, *l. c.* 684, the Court construed the provision of the Constitution in question, saying:

> "This clause of the Constitution, like the less perfect provision on the subject in the Articles of Confederation, as observed by Mr. Justice Story, 'was intended to give the same conclusive effect to judgments of all the States, so as

> to *promote* uniformity, as well as certainty, in the rule among them'; and has these three distinct objects: First, to declare, and by its own force establish, that full faith and credit should be given to the judgments of every other State. * * * But when duly pleaded and proved in a court of that State, they have the effect of being not merely *prima facie* evidence, but conclusive proof, of the rights thereby adjudicated; and a refusal to give them the force and effect, in this respect, which they had in the State in which they were rendered, denies to the party a right secured to him by the Constitution and laws of the United States."

And in Insurance Co. vs. Harris, 97 U. S. 381, *l. c.* 336, it was said:

> "When a judgment or decree has been given in one State by a court having jurisdiction of the parties and the subject, it has the same force and effect when pleaded or offered in evidence in the courts of any other State."

And see Harris vs. Balk, 198 U. S. 215.

Selig vs. Hamilton, Receiver, —— U. S. —— (decided June 22, 1914) was an action brought in New York to enforce the liability of a stockholder of an insolvent Minnesota corporation pursuant to an assessment made by order of the Minnesota court in a case brought by a creditor on behalf of itself and all other creditors. The statutes of Minnesota authorized the court in such a suit to order the assessment. The Court said:

"It follows that if the Court, thus having jurisdiction and acting upon the evidence before it in the statutory proceeding, assessed former stockholders for the purpose of providing for debts incurred while they held their stock, its determination with respect to the amount of the assessment and the necessity therefor must be deemed conclusive. These questions cannot be reopened in another court when the receiver sues to collect the amount of the assessment. *The stockholder in such a suit is free to urge his personal defenses, but this does not mean that he may resist the receiver's demand upon the ground that the assessment was not needed.* The marshaling of the amounts recovered from stockholders is also the appropriate subject for the consideration of the court which, under the statute, collects and distributes the fund. It is quite obvious that another court, in an action by the receiver against the stockholder, could not undertake to fix the amount required to pay the debts for which the stockholder is liable unless it virtually assumed the duty imposed by the statute of determining what a ratable assessment should be and thus denied due credit to the determination already made in a court of competent jurisdiction."

IN CONCLUSION.

This case has a significance beyond the immediate or pecuniary effect of the Minnesota judgment. It is obvious that the business of the Company cannot be efficiently conducted nor to the best advantage of its members, if the rules of administration of its internal affairs as determined by the courts of the State by which it was chartered may be disregarded by the courts of every other State in which it does business.

It is respectfully submitted that the judgment of the Minnesota court in this case should be reversed.

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FEB. 8 1915
JAMES D. MAHER

No. 213

Supreme Court of the United States

OCTOBER TERM, 1914.

THE HARTFORD LIFE INSURANCE COMPANY,
HARTFORD, CONNECTICUT,
Plaintiff in Error,

vs.

[illegible],
Defendant in Error.

WRIT OF ERROR TO THE DISTRICT COURT OF HARVEY COUNTY, STATE OF KANSAS.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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Supreme Court of the United States.

OCTOBER TERM, 1914.

THE HARTFORD LIFE INSURANCE COMPANY, HARTFORD, CONNECTICUT, PLAINTIFF IN ERROR, vs. ELIZA IBS, DEFENDANT IN ERROR. } No. 213.

WRIT OF ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY, STATE OF MINNESOTA.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

The statement of facts made by counsel for defendant in error is correct so far as it goes, but it does not fully state the conditions existing with respect to the mortuary fund.

The assessment in question was predicated upon losses enumerated in the call and aggregated $323,-919.95. Of these about $200,000 had previously been paid, but not assessed for. If the company had no right to include these in the call, then the call was for too large an amount. There was at the time $168,473.58

in the mortuary fund, and if this must be used up before an assessment could be made, as it was more than enough to meet all the unpaid losses enumerated in the call, the assessment was unwarranted altogether.

But under the Connecticut decree the Company had the right to maintain a mortuary fund for the payment of losses *in advance of assessment therefor,* and so had the right to make an assessment for losses previously paid, as only so could that mortuary fund be maintained.

And the Company in this respect kept within the limits prescribed by the decree. The amount in the fund was not more than one-half of the maximum fixed, that is, not more than one-half of "the average of the four preceding quarterly assessments." Neither was it more than necessary to meet possible demands upon it. The unpaid losses which had accumulated by June 1st, when the assessment was payable, amounted to $560,000.00, and the assessment, plus the money in the mortuary fund, was short of this to the extent of $68,000.00. That the mortuary fund was used in good faith for its professed purpose is evidenced by the fact that of the losses enumerated in the call for the assessment, nearly two-thirds had been paid before the issue of the call.

The Question of Privity.

The privity between the parties involved here is a privity of contract, and if no privity existed between them, Mrs. Ibs would not be entitled to maintain this suit.

"The general rule undoubtedly is that plaintiff in an action on a simple contract must be the person from whom the consideration of the contract actually moves, and that a stranger to the consideration cannot sue on the contract. Mellen vs. Whipple, 1 Gray, 321. But whenever there is a privity of contract between the plaintiff and defendant, as when the promise is made directly to the plaintiff, although the consideration for the promise proceeds from a stranger, the defendant is liable to the plaintiff in an action upon the contract because of such privity."

Monaghan vs. Fire Ins. Co., 53 Mich 238, *l. c.* 244.

"Privity of contract is the relationship that exists between two or more contracting parties. It is essential to the maintenance of an action on any contract that there should subsist a privity between the plaintiff and defendant in respect to the matter sued on."

Hartley vs. Phillips, 198 Penn. St., 9, *l. c.* 13.

The husband, Herman Ibs, made the contract in suit with the Insurance Company. He paid the consideration which induced the promise of indemnity. The defendant in error did not join in the execution of the contract and it was not necessary that she should even have knowledge of it. The promise was to pay to her upon the conditions stated. She was thus interested in the contract; she was related to it, and there was privity, therefore, between her and the other parties. She can recover only under the terms of the contract, for the privity extends to the burdens as well as to the benefits.

The contract provides (R., 69) that:

> "The member further agrees and accepts this certificate upon the express condition that if either the Annual Dues, Assessment or Safety Fund Deposit, as hereinbefore required, are not paid to said Company on the day due, *then this Certificate shall be null and void, and of no effect, and no person shall be entitled to damages or the recovery of any moneys paid for protection while the Certificate was in force, either from said Company or the Trustee of the Safety Fund.*"

This condition was binding upon Mrs. Ibs and must be performed if the certificate was to be kept in force. But it was not necessary that she should be given notice of the various assessments levied or of the final default of her husband. She was bound by the notices to him and his default was likewise her default. The universal usage in the business of Life Insurance is predicated upon privity of contract between insurer, insured and beneficiary. The Company as to notices and the like deals always with the insured and never with the beneficiary.

As Mrs. Ibs was bound by the notices of assessments sent to her husband, even though she had no knowledge of them, in like manner and by reason of the same privity of contract she was bound by the Connecticut decree if he was bound thereby.

The Insured Bound by the Connecticut Decree.

Herman Ibs, when he became a member of the Safety Fund Department, with his fellow members, committed the conduct of that Department to the Company sub-

ject to the laws of Connecticut and the provisions of the certificates of membership.

The Company was a creature of Connecticut law and subject in all matters of internal concern to the jurisdiction of the Connecticut courts.

Questions of administration affecting all members alike were exclusively for those courts to determine, for if they were open to determination by the courts of any and every State in which members resided, the uniformity of rule essential to just and right administration might be rendered impossible.

In such matters the Company represented the members, just as in corporate matters it represented its stockholders.

The principle involved is the same as that declared in the recent case of Selig vs. Hamilton.

Shareholders, when called to account, in case of insolvency of the corporation, whether for a liability imposed by statute, or for unpaid stock subscriptions, are certainly interested in the determination of the amount of the assessment against shareholders as such, and yet that assessment may be made and is made by the courts of the State of which the company is the creature and in suits to which the shareholders need not and usually are not all of them made parties. The shareholders not made parties are represented by the corporation.

In Sanger vs. Upton, 91 U. S. 56, the Court said respecting an order for the collection of unpaid sub-

scriptions to capital stock made in a bankruptcy proceeding:

> "It was not necessary that the stockholders should be before the court when it was made, any more than that they should have been there when the decree of bankruptcy was pronounced. That decree gave the jurisdiction and authority to make the order. The plaintiff in error could not, in this action, question the validity of the decree; and, for the same reasons, she could not draw into question the validity of the order. She could not be heard to question either, except by a separate and direct proceeding had for that purpose. She might have applied to the District Court to revoke or modify the order. Had she done so, she would have been entitled to be heard. but it does not appear that any such application was made. As a stockholder, she was an integral part of the corporation. In the view of the law, she was before the Court in all the proceedings touching the body of which she was a member."

Of a similar order made in an equity case, when suit was brought against an individual shareholder to collect the assessment, Hawkins vs. Glenn, 131 U. S. 319, *l. c.* 329, the Court said:

> "A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member. Sanger vs. Upton, 91 U. S. 56, 58 (23, 220, 221), in which case it is also said: 'It was not necessary that the stockholders should be before the court when it (the order) was made any more than that they should have been there

when the decree of bankruptcy was pronounced. That decree gave the jurisdiction and authority to make the order. The plaintiff in error could not, in this action, question the validity of the decree; and for the same reasons she could not draw into question the validity of the order. She could not be heard to question, either, except by a separate and direct proceeding had for that purpose.' As against creditors there is no difference between unpaid stock 'and any other assets which may form a part of the property and effects of the corporation' Morgan County vs. Allen, 103 U. S. 498, 500 (26; 498, 502): and 'the stockholder has no right to withhold the funds of the company upon the ground that he was not individually a party to the proceedings in which the recovery was obtained.' Glenn vs. Williams, 60 Md. 93, 116. In the last cited case, which was an action to recover upon the assessment controverted here, the Court of Appeals of Maryland passed upon the question now before us, and held, in an able opinion by Alvey, J., that the Richmond Chancery Court acquired jurisdiction over the express company and the trustee; that that Court had power and jurisdiction to make assessments upon the unpaid subscriptions to raise funds to pay the corporation's debts, and its decree making such assessment was binding and effective 'upon the stockholders who were not in their individual capacities parties to the cause': that Glenn was legally appointed trustee; and that the Statute of Limitations began to run only from the time the assessment was made by the decree of the Court of Virginia, and could form no bar to the right to recover in the action. Sanger vs. Upton, *supra*, is quoted from,

and it is correctly stated that that decision 'was made not in pursuance of any express provision of the bankrupt law, but in analogy to the powers and procedure of a Court of Equity, and to meet the requirements and justice of the case."

* * * * *

"We think it cannot be doubted that a decree against a corporation in respect to corporate matters, such as the making of an assessment in the discharge of a duty resting on the corporation, necessarily binds its members in the absence of fraud, and that this is involved in the contract created in becoming a stockholder."

See also

Howarth vs. Lombard, 175 Mass. 570.
Bernheimer vs. Converse, 206 U. S. 516.

The argument on behalf of the shareholder in these cases was a plausible one. Why should he not be present as a party when the assessment was made? This determined the amount he was to pay, and next to the question of his liability to pay anything at all, he was vitally interested in the amount.

And yet, in the suit to collect the assessment, the defendant was limited in his defense to what was peculiar to his own case. He might show that he was not a shareholder, or if the suit was to recover unpaid stock subscriptions, that his subscription had been paid in full; and so as to anything else that would relieve him from liability altogether.

Then why might he not defend as to the amount of

the assessment? Because this was neither feasible nor necessary.

Not feasible because the general settlement of the affairs of the corporation must be by one tribunal, which could make comprehensive inquiry and comprehensive determination as to all the interests involved and the appropriate tribunal for this purpose would be a court of the State of the corporation's domicile. But as among the stockholders there might be and frequently were residents of different states of the Union, they could not all be brought in as parties, to say nothing of the expense and inconvenience incident to the attempt to bring them in where the number was great.

Not necessary because the general interest in the amount of the assessment was represented and guarded by the corporation itself, which must be a party to the suit and by such stockholders as were served or did appear. Any stockholder might appear if he chose and help to swell the chorus of objection, but as the volume of sound would not add to the force of the argument, nothing was lost to him by his failure to appear. If only the proceeding was *bona fide,* if there was no fraud, the amount of the assessment must be determined in the same way, whether one stockholder only was a party or whether ten thousand were parties. The corporation itself represented the absent ones, and the presence of stockholders added numbers and nothing more to that representation.

In the present case the maintenance of the Mortuary

Fund and the manner in which assessments must be levied as a consequence of maintaining that fund was a matter of the general administration of the company's affairs and so was of common and not of individual concern. It was proper to maintain such a fund and levy assessment accordingly in the manner made necessary thereby, or it was not proper. If it was right as to Dresser and his associates in the Connecticut case, it was right as to Ibs and all other members who did not appear as plaintiffs. When the course of the Company was challenged in the Dresser suit, every possible interest involved was represented in the suit, either by the plaintiffs or by the defendants, the latter being the company and its officers. Any member might have appeared in that case if he chose to do so, and he would be entitled to be heard upon the one side or the other as he conceived his interest to be, but if the proceeding was *bona fide* as it stood, no possible practical purpose could be served by his appearance.

The Connecticut court certainly had jurisdiction of the Dresser case, and more than that, under the authorities cited, it had exclusive jurisdiction of such a case. But to say that it must have all the members of the Safety Fund Department before it in person is to deny that jurisdiction altogether. Many, perhaps most, of the members were non-residents of Connecticut and could not be served with legal notice. Was this corporation charged with this great trust not subject to control by the courts of the State which created

it? Such a conclusion cannot be avoided if to every suit involving the discipline of the corporation, every member must be made a party.

The assets of the Safety Fund Department, including the Mortuary Fund, were trust funds, of which the company was the trustee, and the insured were the beneficiaries. When Dresser and his associates instituted their suit, they challenged the propriety of the trustee's administration of these funds. Dresser asserted no grievance personal to himself. The maintenance of the Mortuary Fund was not necessarily adverse to any member of the Safety Fund Department. Indeed, its sole purpose was to promote the purpose of the trust by providing as well as could be done for the prompt payment of losses. The Connecticut court was called upon to determine whether this purpose and the manner in which it was realized were consistent with the terms of the trust. In such a suit, the members of the Safety Fund Department who did not challenge the propriety of the company's administration of the trust were represented by the trustee; the nature of the case did not call for the presence of all the members before the court. It is within the principle of Beals vs. Railroad Company, 133 U. S. 290, in which it was held that all the bondholders, although not parties to the suit, were concluded by a decree annulling the bonds and the mortgage securing them, the company issuing the bonds and the trustee under the mortgage being defendants and making defense in good faith.

The Court said, *l. c.* 295:

> "The bondholders were thus fully represented in that suit, and bound by the decree cancelling and annulling the bonds and mortgage, unless the decree was fraudulently obtained."

The Dresser suit was a suit against the Mortuary Fund to compel its discontinuance and distribute its contents ratably among policy holders. The Company was bound to defend its course of conduct if it was acting in good faith, believing that such a fund was in promotion of the trust purpose. If the Fund was wrongfully maintained in the judgment of the Court, it could not turn Dresser away because twenty thousand other members had not joined with him. Their presence was not essential to complete justice as between all concerned. A decree ordering discontinuance of the Fund and distribution of the money in it must be rendered, and certainly the Company could not rightfully withhold his portion from any member, because he was not a party nor could it compel him to litigate the matter *de novo*. The judgment of the Court was otherwise. It was in support of the Fund and so distribution was denied. That judgment is also binding upon all the members, as well as upon the Company.

There could be but one rule as to this Mortuary Fund, the same as to every member. If continued it must be continued as to all, and if discontinued, it must be discontinued as to all. No doubt the great body of the members approved the Fund, certain it is, that only Dresser and his associates objected. Given judgment

approving the Fund in a suit to which the objectors and the Company were parties, where the issue of fund or no fund was squarely presented, and the court being the court of appropriate jurisdiction, of the Fund itself and to determine the question of its proper administration, it must be that the judgment preserving the Fund is, in the absence of fraud, binding upon the absent members as well as upon those present.

And the question of the effect of the judgment upon Ibs was not one that the Minnesota court could decide for itself as not involving the faith and credit due to the judgment.

The Minnesota court was not at liberty to determine as it pleased what were the issues in the Dresser case and what was settled by the decree therein. If that were permitted the full faith and credit clause would be of no value. Any judgment might be rendered ineffective by misconstruction. This Court must determine the scope and effect of the judgment in question.

We submit that the Connecticut decree was binding upon Ibs insofar as the status of the Mortuary Fund was concerned, not alone because Ibs was represented in the case, but as well because the decree was concerning the proper administration of the Fund of which the Court had exclusive jurisdiction.

Bigelow vs. Old Dominion Copper Company, 225 U. S. 111, cited by counsel is not to the purpose. Bigelow and Lewissohn, it was alleged, had despoiled the Com-

pany and the Company sought redress against them in separate suits, against Lewissohn in New York and against Bigelow in Massachusetts. The suit against Lewissohn was determined adversely to the Company and Bigelow pleaded the judgment in bar of the suit against him. The Massachusetts court denied the plea and its action was approved by this court.

Bigelow contended that under the law of New York a judgment in favor of one joint wrongdoer was a bar to a suit by the same plaintiff for the same cause of action against the other wrongdoer. This Court held that Bigelow was neither party nor privy to the New York suit, was not represented in the suit in any way, had no right to appear or be heard in it and would not have been bound by any adverse judgment therein, and so could not take advantage of a judgment in favor of Lewissohn. The New York court did not and could not adjudicate anything with respect to Bigelow, and so it was open to the Massachusetts court to determine as a matter of general law what effect, if any, the New York decree had as to Bigelow. And denying to the judgment any effect as to Bigelow in no way impaired its force. The adjudication in favor of Lewissohn remained intact.

The distinction between such a case and the one at bar where there is privity of interest, representation, the right to appear and defend and moreover, absolute unity and identity of interest and where in addition the judgment pleaded in bar would be nullified if not accepted as an adjudication, is distinctly recog-

nized by the Court in the concluding paragraphs of the opinion, the Court saying, *l. c.* 142:

> "There is no parallel between the relation of joint tort feasors and that of a stockholder to his corporation. In the latter case, the stockholder, by the organic law of his corporation, is a member and represented by it so long as it keeps within its corporate powers.
>
> "In the other instance, one wrongdoer when sued does not represent those not sued, although they had co-operated in the wrong and were both liable."

In the case at bar, the Connecticut court had jurisdiction directly of the subject matter of the suit, which was an entirety and of the parties by representation, and its judgment as to the administration of the Mortuary Fund was conclusive upon all parties interested in that fund.

The Minnesota Judgment Nullified the Connecticut Decree.

It is contended that the Dresser case only decided that the money then in the Mortuary Fund should not be distributed among the members. That was one and only one immediate practical result of the decree. Distribution was denied upon the ground that the Fund was being properly maintained as a current fund for the prompt payment of losses. As a consequence, not only was the money then in the Fund not to be distributed, but the same was true of the money which might come into the fund thereafter in the course and under the same rule of administration.

That the cause of action in the two cases was not the same is conceded, but that is immaterial. The right, question and fact, alike as to the Company and the members were the same. It is conceded also that it is not enough that the same proposition of law was involved in both. The requirement of Scott vs. Donald, 165 U. S. 107, is fully met. The same subject matter was involved, the continuous maintenance of a Mortuary Fund for the payment of losses in advance of assessments therefor.

The Connecticut Court said to the Company, "maintain such a fund up to or not beyond the average of your quarterly assessments for the preceding year." That was not simply a denial of distribution of money in the Fund. It was a rule of administration, and it necessarily affected the assessments to be made thereafter.

If the Court was right and the Company was right in following the direction of that Court, then the assessment which Ibs failed to pay was a lawful and rightful assessment and his failure to pay it, ended his membership.

The conduct of the Company was pursuant to and in consonance with the Connecticut decree. If the Connecticut decree had been otherwise, and had ordered the distribution of the money in the Fund, every subsequent assessment must be predicated upon losses which had not previously been paid and must be limited to such losses. It could not in order to replenish the Mor-

tuary Fund be predicated to any extent upon losses previously paid out of that fund.

When the defendant in error sued upon the policy it was objected that the policy was no longer in force, because the last assessment had not been paid and the reply was that the assessment was illegal. And this was really the only issue in the case.

To support its position, the Company presented the Connecticut decree. Certainly, under this decree, the assessment was legal, because this decree said in terms that the Company was reasonably entitled to hold the Mortuary Fund "for the purpose of enabling it to pay losses promptly."

To hold such a fund, it was necessary to predicate assessments upon losses already paid, but not assessed for, and to put the money so received into the Mortuary Fund. In no other way could the Mortuary Fund be maintained. And of course if the Fund was to be a constant one, so that any loss could be paid at any time, assessment must be made even though there was some money in the fund.

What the Connecticut Court held to be lawful, the Minnesota Court held to be unlawful, *i. e.*, to levy an assessment on account of losses previously paid, or when there was money enough in the Mortuary Fund to meet the unpaid losses enumerated in the call for the assessment.

Because the assessment included what it must include under the Connecticut decree, the Minnesota court held it to be illegal, saying (Record, p. 133):

"We think it clear that the necessity for this assessment and its validity must be determined by the condition of the so-called Mortuary Fund on March 31st, and the amount of the death losses to pay which the assessment was levied according to the notice sent to members. There were some death losses at that date which, though not used as a basis for arriving at the amount of the assessment and not mentioned in the call, had been reported to defendant and part of them approved. We hold that these should not be considered. The assessment was not levied to pay such losses, but only the losses stated in the list accompanying the notice. Death losses not included in this list were included in subsequent assessments."

It is undisputed that two-thirds of the losses enumerated in the notice sent to members had already been paid, although not previously assessed for, and that the balance in the Mortuary Fund was sufficient to pay such of the enumerated losses as had not been paid, and for this reason the Court held the assessment to be unnecessary and illegal.

Collections under this assessment to the extent of the enumerated losses previously paid would go into the Mortuary Fund and be used to pay accrued losses in advance of specific assessment therefor, in other words, replenish the fund and keep it alive as had been done for many years and as the Connecticut decree said was right and proper.

But the Minnesota Court said this might not be done and in effect as to Ibs ordered what the Connecticut Court had refused, a distribution of the fund, giving to

Ibs his portion by applying it in payment of his assessment.

The Minnesota Court, as it seems to us, inconsistently with what is quoted above, says (R., p. 135):

> "It probably is true that it is convenient and altogether desirable to have money on hand out of which to promptly pay losses that have accrued. *And we do not hold that this course is not warranted by the provisions of the contract. What we do hold is that when this balance on hand is sufficient in amount to pay all losses that have accrued, an assessment to pay such losses is unnecessary and illegal at least to the extent that a forfeiture cannot be predicated upon the non-payment of such an assessment.*"

Here the propriety of the fund is recognized, but at the same time the only way of maintaining it is held to be illegal.

The reasoning of the Court is self-destructive. It holds the Fund to be "convenient and altogether desirable," and "warranted by the provisions of the contract" and this being so, assessments on account of losses previously paid could not be illegal. But the Court holds "that when the balance on hand is sufficient in amount to pay *all losses that have accrued,* an assessment to pay such losses is unnecessary and illegal."

But, confessedly, the balance on hand was not sufficient to pay "all losses that had accrued." It was sufficient to pay "all losses that had accrued" *which were enumerated in the call for the assessment.*

As the Court says on p. 133, there were some losses which had been reported and approved but not listed in the call and as to these it says that they *"should not be considered."* Excluding these and excluding those previously paid, the Mortuary Fund could not be maintained at all and there would be an end of the prompt payment of losses, albeit this was "convenient and altogether desirable," and "warranted by the terms of the contract."

So while the Minnesota Court approves the fund as proper and legal, it yet finds the kind of administration and mode of assessment necessary to maintain it, to be "unnecessary and illegal at *least to the extent that a forfeiture cannot be predicated upon the non-payment of such an assessment.*"

By implication the assessment was necessary and legal to an extent, that is to the extent of enforcing it in some way other than by forfeiture of membership. Legal to make the demand under the contract, but not legal to the extent of applying the only remedy prescribed by the contract in case of a refusal to meet the demand. If the assessment was properly made, Ibs was bound to pay it, and failing to pay, his membership was lost. The assessment in this respect was good or bad. It could not be like the curate's egg, "parts of it very good."

What the Minnesota Court speaks of as a forfeiture, is a mere consequence of not paying the assessment. The contract of membership provides that it shall be null and void if an assessment is not paid. That, of

course, means a lawful assessment, and so the question is, was the assessment in controversy a lawful one? Upon this question the Minnesota Court must pass and it was free to exercise its own judgment with respect thereto, except insofar as it had been determined by the Connecticut Court. There is no suggestion of anything wrong in the assessment except that the greater part of the proceeds would go into the Mortuary Fund and be used for the payment of losses in advance of assessment. Was this illegal, or not within the contract, or an abuse of the trust by the trustee? The Connecticut Court said it was not, and that on the contrary it promoted the purposes of the trust. To this determination, the Minnesota Court gave no heed, and rejected the decree when offered in evidence as without force or effect in the case and so refused it the faith and credit to which it was entitled under the Constitution.

Respectfully submitted,

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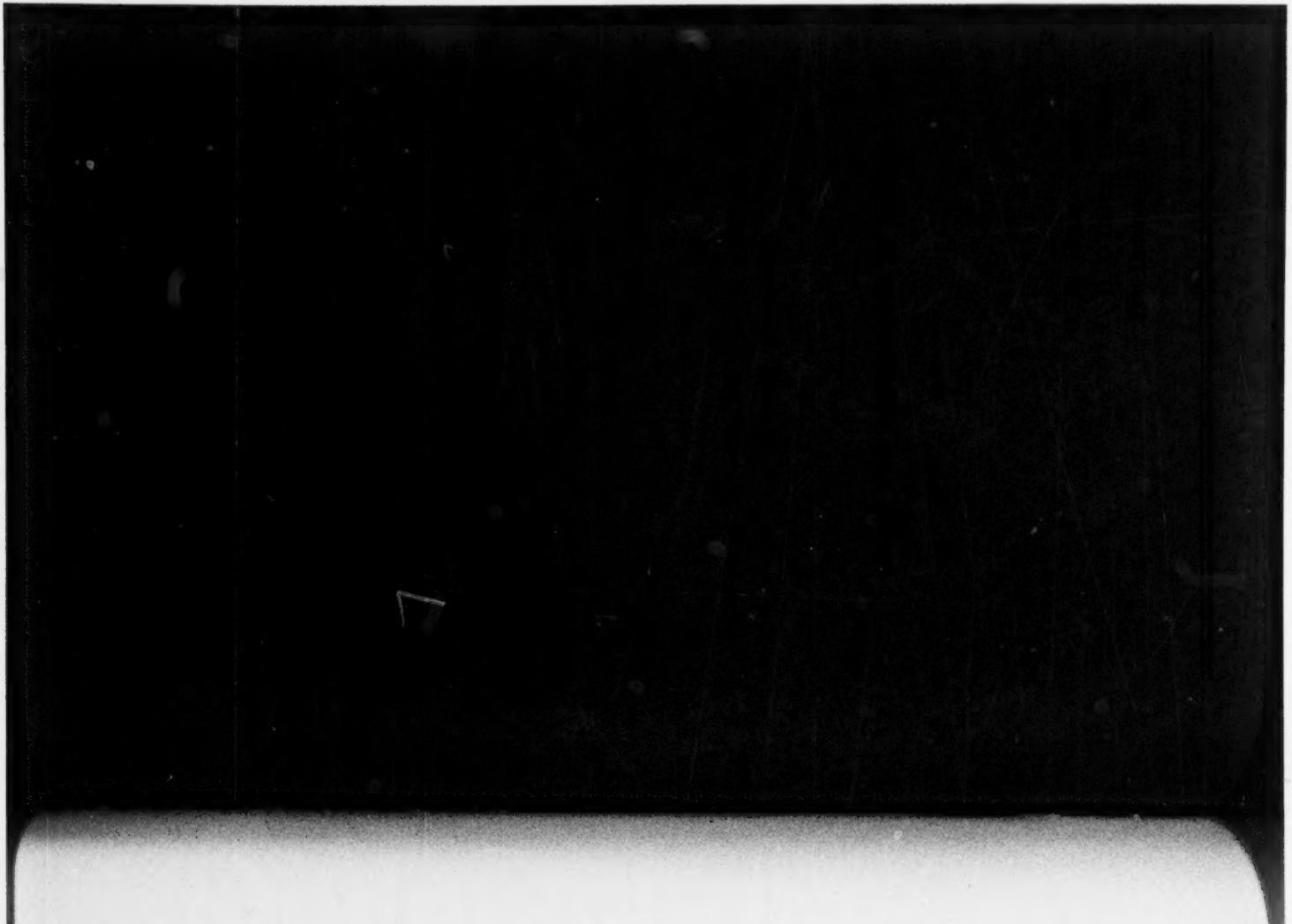

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Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 213.

THE HARTFORD LIFE INSURANCE COMPANY, HARTFORD, CONNECTICUT,

Plaintiff in Error,

vs.

ELIZA IBS,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is an action commenced in the District Court of Ramsey county, State of Minnesota, by the defendant in error against the plaintiff in error on a policy of insurance. The action was tried before a jury; at the close of the testimony each of the parties moved for a directed verdict, there being no conflict in the evidence. The District Court directed a verdict in favor of the defendant in error for the amount of the policy with interest and the jury returned a verdict in her favor for the sum of $2,268.32. The plaintiff in error thereupon appealed to the

Supreme Court of the State of Minnesota, and on May 2, 1913, that court affirmed the order of the District Court refusing a new trial and remanded the cause to the District Court with directions to enter judgment for the defendant in error upon the verdict. On the 17th day of May, 1913, the District Court of Ramsey county rendered a judgment against the plaintiff in error and in favor of the defendant in error for the sum of $2,380.72. The plaintiff in error thereupon presented to this court its petition for the allowance of a writ of error to the District Court of Ramsey county, Minnesota. On June 2, 1913, Mr. Justice Lurton allowed the writ with the following notation made thereon: "I am not clear that this writ should be allowed, but prefer that the doubt shall be solved by the court." (Rec. 2.) The defendant in error submitted a motion to dismiss the writ of error for want of jurisdiction, and if that motion should be denied, then for affirmance of the judgment on the ground that the writ was taken for delay only and that the questions on which the decision of the cause depend are so frivolous as not to need further argument. The consideration of this motion was deferred until the hearing on the merits.

On the 4th day of April, 1885, the plaintiff in error issued to Herman Ibs a policy of insurance in the sum of two thousand ($2,000) dollars, the defendant in error being named therein as the beneficiary. The insured complied with all the provisions of the policy, and regularly made payments of all the dues and assessments, except "Call No. 127," which became payable on June 20, 1910. The insured died on the 27th day of June, 1910. The defendant in error sent to the plaintiff the amount of this last Call on the 29th day of June, 1910, and it was received by it not later than the 1st day of July, 1910, and returned to the beneficiary within a month thereafter. (R. 88.)

The only defense pleaded is that the insured failed to make the payment due on June 20th, and that under the terms of

the policy it was properly canceled. The beneficiary claimed that the payment demanded, that is, "Call No. 127" was unlawful; that the insured was not required to make it, and that failure to pay did not justify the forfeiture of the insurance.

The policy provides that it is issued in consideration of certain assessments levied against the members to form a mortuary fund for the payment of all indemnity matured by the deaths of members and these assessments are to be levied against all the members whose certificates are in force at the dates of such deaths. The assessments are to be paid within thirty days from the date of the notices, and the proceeds thereof shall form the mortuary fund, and the death losses are due and payable out of the mortuary fund, and not otherwise. (R. 66.)

The policy also provided for the payment of certain expense dues of $3.00 per annum on each $1,000 of insurance, and the dues are to be retained by the insurer as compensation for managing and transacting the business of the department in which the policy was issued. (R. 66.)

On May 2, 1910, the insurer sent to the insured a notice of Call No. 127. This call was made to meet the benefits of $323,919.95, payable on 145 death losses and the expense dues on the policy. The notice of this call states that it includes a mortality call, amounting to $33.95, and quarterly dues to September, 1910, amounting to $1.50, making a total of $35.45. This notice gave the insured until June 5, 1910, to pay the amount of the call, and states that unless the payment called for be paid to the company before the day it falls due, the policy and all payments thereon shall become forfeited and void, and if the payment of the call is not received on or before June 5th a second notice will be mailed giving until June 20, 1910, to remit. (R. 76, 77.)

Accompanying the notice of the call was a statement giving the names of the 145 members who had died, their respective

places of residence, the dates of their deaths, and the amount of the insurance carried by them.

The insured having failed to respond to the call, the insurer on June 9, 1910, mailed to the insured by registered letter a second notice and enclosed with it a copy of the notice of May 2, 1910. This second notice notified the insured that unless the amount of $35.95, the amount due on the quarterly call including 50 cents for a second notice, be received at the office of the company on or before June 20, 1910, the policy would be canceled. (R. 76.)

For a period of at least ten years prior to the date of the notice of Call No. 127, the insurer invariably followed the practice of sending the insured notices of the respective quarterly calls falling due during that period of time; except as to the number of the call, the date thereof and the amount, the notices during that whole period of time were precisely the same as the notice of Call No. 127, bearing date May 2, 1910. During all these years the insured was invariably notified that the respective calls were made to meet a certain number of deaths as shown by the accompanying lists, and to meet also the expense dues on the policy. All of these notices stated the amount of the mortality call or assessment and the amount of the quarterly dues; each of these notices stated that unless the payment called for by the notice be made to the company by or before the day it falls due, the policy and all payments thereon would become forfeited and void. No separate demand was ever made by the company for the payment of the quarterly dues, nor was any separate demand ever made for the payment of the mortality call or assessment; the insured never paid his dues or assessments at different periods of time; they were always paid at the same time and in one sum, covering both the dues and assessments. The record contains two of these notices, to-wit: Quarterly Call No. 86, and No. 87; it was not deemed necessary to print the notices of the other

calls from Call No. 27 to Call No. 126. (R. 22, 23, 24, 25, 86, 87, 88.)

While the notice of Call No. 127 is dated May 2, 1910, the assessment in fact was prepared and based upon the conditions and data existing on March 31, 1910. (R. 27, 53.) The assessment was leveid to raise the sum of $323,919.95, the amount necessary to cover 145 death losses, and the $33.95 included in the notice of May 2nd was the proportionate contribution of the insured to pay these total death losses.

The insurer had, prior to March 31, 1910, paid on account of these death losses out of the mortuary fund raised by prior assessments, the sum of $198,994.19, and there remained on that day an unpaid balance of these death losses of $124,925.76. (R. 28.)

It is admitted that on March 31, 1910, the insurer had on hand in the mortuary fund the sum of $168,473.58, an amount largely in excess of the balance required to pay all of the outstanding and unpaid death losses covered by Call No. 127. It is apparent that if the insurer had used this balance then on hand, it could have extinguished the whole of its liability incurred for these deaths, and still have on hand in the mortuary fund a balance of $43,547.82. This mortuary fund was absolutely under the control of the insurer and its officers and was absolutely subject to check. (R. 28, 30.)

The insurer introduced evidence relating to death losses other than those included in Call No. 127 and existing on March 31st and April 30th, 1910, respectively, and the condition of the mortuary fund on the last mentioned date. Since the evidence shows conclusively that the assessment in question was levied solely for the purpose of meeting the 145 death claims, a list of which was sent to the insured, and no other death losses, and that the death losses not included in Call No. 127 were assessed for at a subsequent date and the policy holders were given notice of the deaths with the notice of the assess-

ment, it was held by the State court that such evidence was wholly immaterial to the issues of the action.

It appeared, however, from that testimony that the insurer proposed to collect from its policy holders under Call No. 127 the sum of $290,726.86 over and beyond the amount required to pay every approved death loss existing on the 31st day of March, 1910; also that the insurer included in Call No. 127 the sum of $152,726.86 over and beyond the amount required to pay every reported death loss in existence on March 31, 1910.

The foregoing statement of facts contains the substance of the evidence bearing upon the liability of the plaintiff in error; the rules of law applicable thereto present no federal questions; they are based wholly upon the general law and this Court has no jurisdiction to re-examine them.

The plaintiff in error offered in evidence two judgments of the New Haven County Superior Court of the State of Connecticut in an action commenced by Dresser et al. v. The Plaintiff in error, et al. These judgments were rendered in an action to which neither the defendant in error nor the insured was a party. The main issues of that action were the ownership of a safety fund of $1,000,000.00, held by the Security Company, one of the defendants in that action, in trust for the policy holders; the amount of the compensation to which the surety company was entitled for administrating the trust and the character of the securities permitted by the contract. The plaintiffs in that action also claimed that the plaintiff in error was levying assessments unnecessary in amount and number, for its own wrongful purposes, and claimed that the balance in the mortuary fund not necessary to pay death claims, should be distributed among the outstanding certificate holders. These judgments were rendered on the 23rd day of March, 1910, eight days before the assessment in question here was levied and some months before the present cause of action accrued. The rights of the defendant in error were not involved nor con-

sidered by the court in rendering these judgments. (R. 103-119.)

The assignments of errors indicate that the sole federal questions claimed to be here involved are that the state court refused to admit in evidence the two judgments rendered in the Dresser suit, and thereby violated Article 4, Section 1 of the Constitution of the United States, requiring full faith and credit to be given to the judgments of a sister state, and also Article 1, Section 10, of the Constitution, forbidding the passing of any law impairing the obligation of contracts.

POINTS AND AUTHORITIES.

I.

THE DEFENDANT IN ERROR WAS NOT A PARTY TO THE CONNECTICUT SUIT EITHER OF RECORD, BY PRIVITY OR REPRESENTATION.

The District Court of Ramsey county refused to receive in evidence the decrees in the Dresser case; the Supreme Court of Minnesota held it was not error to exclude them from evidence and that neither constitutional provision referred to in the assignments of error was violated.

One of the grounds assigned for this ruling is that the parties to the two suits were not the same. Plaintiff in error concedes that "Mrs. Ibs was not a party either as plaintiff or defendant in the Connecticut case, nor would she have been admitted as a party in Connecticut if she had applied." (Brief, p. 32.)

The insured, Herman Ibs, was not a party of record to the Dresser suit; neither he nor his wife, the beneficiary named in the policy, was served with process in that suit; nor were they ever notified of the pendency thereof, nor did they appear therein; they resided in Minnesota when the policy was issued, (R. 66) and continued to reside in that state until the death of the insured. (R. 76, 86-88.)

It was incumbent upon plaintiff in error to establish that the Dresser decrees were not given the due effect to which they were entitled and if it failed to sustain such burden this Court cannot say that error was committed by the judgment below rendered (Commercial Pub. Co. v. Beckwith, 188 U. S. 567); and it was required to show that the Connecticut court had jurisdiction of the Dresser suit and jurisdiction to enter the decrees (Brief, p. 39); and it was required to show also that the Connecticut court had in some lawful manner acquired jurisdiction over the defendant in error or the insured and that the former was in privity with the latter.

If it were conceded that the issues in the two suits were the same, yet if the parties to the two suits were not the same or if the defendant in error was not in privity with any of the parties to the Dresser suit, then full faith and credit were not denied to the Connecticut decrees by the refusal of the Minnesota courts to receive them in evidence.

The position of the plaintiff in error must be, although it is not definitely so stated in its brief, that the Dresser decrees constitute a bar on the principle of *res judicata* or estoppel by judgment to the pending action. The Minnesota courts are not in accord with this position.

It is claimed here that, "The plaintiff in the Minnesota case stood as to the Connecticut case in privity with her husband, and he was by representation a party to the Connecticut case." (Brief p. 19.)

Not a single authority is cited, nor any reason stated, nor argument advanced to sustain the claim that "The plaintiff * * * stood * * * in privity with her husband." Unless this claim is well founded, there must at the very threshold of this discussion be an end to the whole controversy, for it is admitted that the beneficiary was not a party to the Connecticut case and would not have been admitted as a party if she had applied.

Let us proceed to test the soundness of this position.

THE DEFENDANT IN ERROR WAS NOT IN PRIVITY WITH HER HUSBAND, THE INSURED.

Herman Ibs and the defendant in error sustained towards each other the relation of husband and wife and also of insured and beneficiary. Surely this claim of privity cannot be based upon the former relation alone for it is well settled that if, in respect to the subject matter of the wife's action, there was a privity between the husband and wife, he would be bound under the same circumstances as a former judgment binds *other*

persons, and not otherwise, and that a judgment against the husband in an action in which his wife is not a party will not conclude the wife in a subsequent action and concerning her separate estate in which the wife is a party alone or in which the husband and wife are joined. (Am. and Eng. Ency. of Law, 2nd Ed., Vol. 24, 750.)

This action is based upon the contract of insurance entered into between the insured and the insurer; in consideration of the premium which the insured agreed to pay to the insurer, the latter agreed to pay to the beneficiary, if living, the amount specified in the policy. (R. 66.) The contract further provides (R. 71):

> "This certificate shall not be assigned or transferred unless with the *concurrent* action of the member and beneficiary."

The charter of the company contains the following provision (R. 99):

> "Said company may issue policies for the benefit of, and payable to, any married woman, or child or children; and any contract of insurance, thus issued, by whomsoever the same may have been procured, shall be to the extent expressed in the policy, *the sole and separate estate* of the married woman, child or children, to whom the policy, by its terms, shall be payable; and the discharge of such policies by *such married woman* or her assigns, or by such children (or their guardians if minors) shall be a *valid* discharge of the same."

It is well settled that the beneficiary's rights in an ordinary life policy are vested, and cannot be destroyed or affected by the insured in any other way than by allowing a lapse of the policy; when this is done, in pursuance of a scheme on the part of the insured and the company, to avoid the rights of the beneficiary, and the company, disregarding the lapse, immediately issues a new policy based upon the surrender value of the lapsed policy, the rights of the beneficiary will not be affected; a subsequent assignment by the insured cannot be made so as

to affect the interest or defeat the right of the beneficiary to the proceeds; the insured cannot affect the rights of the beneficiary by surrendering the policy for another one in favor of another beneficiary; as to the beneficiary's interest, the insured cannot change the contract of insurance without her consent; he may put an end to the policy by failing to pay the premium, but, so long as he keeps the policy alive, the interest therein of the beneficiary remains unchanged, unless she consents to a change; she has the right to stand upon the terms and conditions of the policy, unchanged and unaffected by any modification of the contract to which the beneficiary does not consent. (See Union Central Life Ins. Co. v. Buxer and note containing authorities, 49 L. R. A. 737.)

In the case of Central Bank v. Hume, 128 U. S. 195, the plaintiff in error under its then name of the Hartford Life and Annuity Co. was one of the parties defendant. It appeared that the charter of one of the other defendant insurance companies provided that any policy issued by that company for the benefit of any married woman shall enure to her sole and separate use and benefit; the opinion states that "as to the Connecticut contracts, the statute of the state where they were made and to be performed, explicitly provided that a policy for the benefit of a married woman shall enure to her separate use." The Court, by Chief Justice Fuller, held:

> "It is indeed the general rule that a policy, and the money to become due under it, belong, *the moment it is issued,* to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance by any act of his, by deed or by will, to transfer to any other person the interest of the person named * * * the rights and benefits given by the laws of Connecticut in this regard are as much a part of these contracts as if incorporated therein."

It has accordingly been held that in a suit by an insurance company to cancel a life policy the beneficiaries are proper and

necessary parties, (Equitable L. Assn. Soc. v. Patterson, 1 Fed. 126) and that where a husband has taken a policy of life insurance in the name of his wife, both must join in demanding a recision of the policy for alleged fraud on the part of the agent of the company, and the husband alone cannot, without her consent, effect a recision, by redelivering the policy to the agent who affected the insurance and that the husband is properly nonsuited in an action *by him alone* to recover back the premium, upon a recision attempted by him alone, *without a release by the wife* of the obligation of the insurance company to her. (Jurgens v. N. Y. L. Ins. Co., 114 Cal. 161.)

The contention of the insurer rests in its final analysis upon the claim that "The adjudication by the Connecticut court involved a construction of the contract between the company and its members" (B. 27); "that which the Connecticut court held was right to be done by the Company under the contract of membership, the Minnesota court held to be wrong" (B. 30); "what was held to be *legal* in Connecticut was held to be *illegal* in Minnesota" (B. 31).

The argument appears to be that the insured was a party to the Connecticut suit by representation; that that suit involved the construction of the contract of insurance; that such construction in effect extinguished the vested interest of the beneficiary, and that she is conclusively bound by the judgment so construing the contract, although she was not a party to that action and could not have appeared therein and defended.

The vested rights of the beneficiary cannot be affected by an assignment of the policy or a surrender thereof without her consent; nor can any scheme be devised between the insured and insurer by which the policy shall lapse and a new policy be issued in favor of another beneficiary; nor can the terms of the policy be in any respect modified by a new contract between the insured and the insurer without the consent of the beneficiary; nor can an action be commenced by the insurer against

the insured alone to cancel the policy; yet in an action between the insured and insurer the policy may be so construed as to prevent a recovery thereon in a subsequent action by the beneficiary against the insurer and the judgment rendered in the former action is binding on the beneficiary on the principle of *res judicata* or estoppel by judgment. This is the position to which plaintiff in error seems to be driven in this case. We cannot believe it to be the law; the beneficiary cannot be deprived of her vested property rights in the policy without due process of law.

It may be conceded as a general statement of the law that a judgment is binding on parties and privies. There is, however, a great deal of confusion and error resulting from an improper understanding of the term "privies." In the case of Bigelow vs. Old Dominion Copper Co., 225 U. S. 111, the Court says:

> "What is privity? As used when dealing with the *estoppel of a judgment,* privity denotes mutual or successive relationship to the same *right of property.*"
>
> "No judgment can be regarded as *res judicata* as to any matter where the rights in the subject matter arise out of mutuality, and not by succession, unless the party could, as a matter of right, appear and defend, even though he may have had knowledge of the suit. Otherwise, *he might be bound by a judgment as to which he had never had the opportunity to be heard, which is opposed to the first principles of justice.*"

The beneficiary was not a party to the Connecticut suit and could not, as a matter of right, have appeared therein and defended, it follows that the judgment entered in that action cannot be regarded as *res judicata* as to any matter arising out of mutuality.

In Hart vs. Moulton, 80 N. W. 601 (Wis.), Justice Marshall states the law as follows:

> "Privity relates to persons in their relation to property *and not to any question independent of property.* In the

doctrine of *res adjudicata*, privity extends no further than the *particular subject-matter or property*, the status of which was determined by the judgment as to that particular thing. A person subsequently dealing with it, dependent for his right to do so upon a title acquired of one of the parties to the litigation after that title was impressed by the result of such litigation, in a controversy with the adverse party or a person claiming under him, is concluded by the judgment. *The mere personal effect of the judgment, however, is absolutely confined to the parties to the litigation.* It does not attach to and become a rule of property as to any other thing than the particular subject of the controversy which was closed by the judgment."

The "property" in controversy in the Connecticut suit was the *excess in the mortuary fund* beyond the amount required to pay existing death losses; the plaintiffs in that action claimed the right to an immediate distribution of the excess among the policyholders and this right was denied by the defendant insurance company. The construction of the contract of insurance was not "property" within the meaning of the law of privity and *res judicata*.

An equally well settled rule relating to the conclusiveness of judgments is that all persons are "privies to a judgment whose succession to the rights of property thereby adjudicated or affected were derived through or under one or other of the parties to the action, and accrued subsequent to the commencement of that suit"; accordingly it has been held that a judgment in an action respecting the rights to real property against the grantor of said property, is binding on his grantee, provided the latter acquired his interests after the institution of the suit; that in the case of personal property a purchaser thereof is concluded by the judgment rendered in an action by or against his vendor, concerning the ownership of the property, provided he acquired his interest during the pendency of the suit, or after the rendition of the judgment therein; and that the assignee of the right of property is concluded by a judgment for or against his assignor in a suit begun before the

assignment, but not where his rights vested prior to the commencement of the action. (Cyc., Vol. 23, p. 1253-1261.)

The beneficiary acquired her rights in the policy of insurance and was vested with such rights the moment the policy was issued; she did not acquire such right subsequent to the commencement of the Connecticut suit; nor did she succeed to any property rights in the policy which were owned by the insured; her rights were not acquired by succession or mutuality, but are based on the contract of insurance, by which at the very inception of the transaction, the insurer agreed to pay her, if living, and her alone, the amount stipulated in the policy.

THE INSURED WAS NOT A PARTY TO THE CONNECTICUT SUIT BY REPRESENTATION.

In the Connecticut action the plaintiffs demanded an immediate distribution of the accumulations in the mortuary fund; the insurance company took the position that the plaintiffs were not entitled to such distribution and that the company should be permitted to retain the balance in the mortuary fund for the purpose of enabling it to promptly pay death losses prior to the collection of the assessment levied to cover such losses. This was plainly an *adverse* proceeding between the plaintiffs representing the policy holders and the insurance company, and the defendant trustee could not represent both its own interests in the matter as well as the interests of the policy holders.

The well settled rule is stated in re Strants estate, 27 N. E. (N. Y.) 259, as follows:

> "It has never been held that in an action by the trustees to reduce such property to possession, or to subject it to their control, it is necessary to make the beneficiaries parties. * * * If the purpose of the action had been, among other things, to determine rights as between the

beneficiaries themselves, *or as between the trustees and the beneficiaries, then it would have been necessary to bring them in as parties.*"

In Kerrison v. Stewart, 3 Otto, 155, the law is stated as follows:

> "Where a trustee represents his beneficiaries in all things relating to the trust property, they are not necessary parties *to a suit against him by a stranger,* to enforce or declare void the trust. In such cases the beneficiaries, although not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party."

In the case of Carey v. Brown, 2 Otto 171, this Court held:

> "The general rule is, that in suits respecting trust property *brought either by or against the trustee,* the cestuis que trust as well as the trustees are necessary parties. To this rule there are several exceptions. One of them is, that where the suit is brought by the trustee to recover the trust property or to reduce it to possession *and in no wise affects his relation with his cestui que trust,* it is unnecessary to make the latter parties."

The plaintiff in error claims in the next place that the insured was represented in the Connecticut suit by the plaintiffs in that action. That suit was commenced by some thirty certificate holders in their own behalf and for the benefit of other certificate holders in the same situation; the insured was not served with process therein, did not appear and was never notified of the pendency thereof.

The plaintiff in error relies upon several decisions of this Court, in which it has been held that where the parties interested in a suit are so numerous that it would be impossible, without great inconvenience, to make all of them parties a court of equity may permit some of the parties in interest to represent the entire body and that the decree binds all of them the same as if they were before the court. This practice, however, is permitted only in cases where the *subject matter of the*

suits is common to all, and where there is a community of interest growing out of the nature and condition of the right in dispute and where there is a common title out of which the question arises. In one of these cases (Scott v. Donald, 165 U. S. 107) the Court says:

> "In the case before me, the only matter in common among the plaintiffs, or between them and the defendants, *is an interest in the question involved,* which alone cannot lay a foundation for the joinder of the parties. There is scarcely a suit at law or in equity which settles a principle or applies a principle to a given state of facts, or in which a general statute is interpreted, that does not involve a question in which other parties are interested; as, for instance, *the doctrine of trusts,* and the statutes of descents, frauds, wills and the like. Yet no lawyer would contend that such an interest would justify a joinder of parties as plaintiffs, in a case arising under the laws of trusts or under any of the statutes mentioned."

The *subject matter* of the litigation in Connecticut was the balance in the mortuary fund; the Connecticut court entertained jurisdiction of that subject matter when only a part of the certificate holders were parties and when they brought the action for themselves and for all other policy holders who desired to come into the case. It may be true that *so far as that subject matter was concerned* that court had jurisdiction to determine the ownership of the balance in the mortuary fund as between the insurance company and the certificate holders, that such judgment is binding upon all the policy holders and that no policy holder may commence another action in the state of Connecticut to re-examine the question of the ownership of that fund or to demand a new or different disposition thereof. The subject matter here, however, is a wholly different one; the claim now made is that the Connecticut judgment is a conclusive bar to the present action brought in another state and raising questions not considered or passed upon in the Connecticut suit; here there is no demand for the distribution of the balance in the mortuary fund.

The plaintiff in error claims that the Connecticut suit involved the internal administration of the affairs of the insurance company and that because the company was organized and its charter issued to it in the state of Connecticut and because it did its business and maintained its principal office in that state, the Connecticut courts alone had jurisdiction to determine all matters relating to the management of the affairs of the company. The case of Condon v. Mutual Reserve, 89 Md. 99, is cited to sustain this position. In that case it is held, however, that there is a broad difference between compelling a foreign insurance corporation, at the suit of a policy holder, to conform its *internal conduct* to the views of a court not located in the state where the corporation was chartered and does its business, and adjudging it, at the suit of a beneficiary, *liable in damages for a failure to comply with its contract of indemnity* and that in the one instance the foreign court has no jurisdiction, but in the other it has. The Court states:

> "If this were a suit on the *insurance policy to recover a loss insured against,* it would be a case within the jurisdiction of the courts of Maryland. In such a proceeding, it would be incumbent on the court to *construe the policy,* and to determine whether it had been *forfeited or not,* because it would have the authority to decide whether a recovery could be had. Necessarily, therefore, the *validity of any assessment,* and the inquiry as to whether an assessment was fraudulent would be a legitimate inquiry; because in a suit on the policy in Maryland the courts of this state would not be called on to *regulate,* by injunction or otherwise, the government of a foreign corporation, but would be required merely to *enforce the contract* or to award damages for its breach."

The action commenced by the defendant in error is not brought for the purpose of *regulating* the internal affairs of the insurance company; the Minnesota courts would have no jurisdiction to pass upon such matters, for the company was chartered in the state of Connecticut. The action here is based

upon the contract of insurance and by it the beneficiary seeks to recover the amount thereof. The Minnesota courts had jurisdiction to determine the validity of the assesment levied upon the insured, as well as the question whether by failure to pay the assessment, the policy under its terms was forfeited.

Whether a judgment entered in an action is *res judicata* as to the parties of the same class, who were not served with process and did not appear, was considered and determined in the case of Wabash R. R. Co. v. Adelbert College, 208 U. S. 38. One of the federal questions raised in that case was "that the decree of the circuit court of the U .S. for the district of Indiana in the case of Ham v. Wabash, St. L. & P. R. Co. was a final adjudication of the issues in the case at bar, binding upon the defendants in error, and conclusive against their right to maintain this suit"; this Court held:

> "The action was commenced by Ham and several other persons, 'on their own behalf, as well as in the behalf of all those in like interest who may come in and contribute to the expenses of and join in the prosecution of the suit'. No notice of the pendency of this suit was given to the other holders of the bonds other than by this allegation in the bill. * * * The judgment in the Ham case was pleaded in the state court in this case as a bar to the suit. The theory of the plea in bar is that the Ham suit was a representative or class suit, and that the judgment in it bound all of the class, even if they were not parties or privies to it. * * * *The allegation that the suit is brought in behalf of all who should join and share in the expense cannot make the judgment binding on those who do not join.* * * * It is clear if such suits in the Circuit Court of the United States could have the effect here claimed for them, and the judgments in them were binding in all courts against all other persons of the same class, that *injustice might result, and even collusive suits might be encouraged. We find no controlling authority which leads us to such a conclusion.* We think that the Ham suit was not a representative suit in the sense that the judgment in it bound the defendants in error, who were not parties to it."

It seems to us that the case last cited is squarely in point and is decisive of the question now under consideration. The company claims that the insured was a party to the Connecticut suit by representation; that although he was not a party of record and did not appear, he was conclusively bound by the judgment entered therein, because the plaintiffs in that suit represented him as well as all other policy holders. This Court has held directly to the contrary. In none of the cases cited by counsel (Smith v. Swornstedt, Scott v. Donald and Wallace v. Adams) was it determined that a judgment entered in a representative or class suit is binding on the principle of *res judicata* or estoppel by judgment upon parties of the same class who were not served with process and did not appear.

In the article treating of judgments, 23 Cyc. 1246, the law is stated as follows:

> "Where one plaintiff belonging to a numerous class, as creditors, bondholders, beneficiaries, and the like, brings an action in behalf of himself and all others similarly situated, the judgment which may be rendered is binding on others of the class who accept the representation, and who connect themselves with the litigation, either by coming into the suit or seeking to share in the fruits of the judgment, or by acquiescing in it. *But it can have no binding effect on those who do not participate in the proceedings, prove their claims, or otherwise join with plaintiff.*"

In ex parte Mark Howard, 9 Wall. 175, and in Williams v. Gibbs, 17 How. 239, this Court held:

> "The principle is well settled in respect to these proceedings in chancery, for the distribution of a *common fund* among the several parties interested either on the application of the trustee of the fund, the executor or administrator, legatee or next of kin, or on the application of any party in interest, that an absent party who had no notice of the proceedings, and was not guilty of willful laches or unreasonable neglect will not be concluded by the decree of distribution from the assertion of his right by bill or petition against the trustee, executor, or administrator."

2.

NEITHER THE BENEFICIARY NOR THE INSURED WAS BOUND BY THE CONNECTICUT DECREES; NEITHER WAS SERVED WITH PROCESS THEREIN, EITHER PERSONAL OR CONSTRUCTIVE; NOR DID EITHER APPEAR.

We have attempted to show the fallacy of the claim that the beneficiary was in privity with the insured and that the latter was a party by representation to the Dresser suit. The insured and beneficiary did not directly authorize the plaintiffs in that suit to appear for and represent them in the action. The claim here is that because the plaintiffs in the pleadings stated that the suit was brought on their behalf and on behalf of all the certificate holders similarly situated, the insured was represented in the action and was bound by the judgment entered therein.

Neither the insured nor the beneficiary were served with any process issued in that action, either personal or constructive; it is not claimed that under the statutes of the state of Connecticut authorizing constructive service, process was served by publication or otherwise either upon the insured or the beneficiary; nor is it claimed that either one of them appeared or authorized appearance; nor is it claimed that either of them received any notice of the pendency of that action. Ever since and before the time of the issuance of the policy upon which this suit is based, both the insured and beneficiary were residents of the state of Minnesota and continued to reside therein up to the time of the death of the insured; the beneficiary still is a resident of that state. The burden rested upon the insurer to show that the insured and the beneficiary were served with process or that they appeared and defended or that they were residents of the state of Connecticut at the time of the commencement or during the pendency of that suit. No such showing has been made.

It has not been claimed by the plaintiff in error that the Connecticut suit was an action *in rem*. The Connecticut suit cannot well be claimed to have been an action *in rem*, for it does not appear that any property, which was the subject matter of the litigation, came under the direct control of the court by any process issued by the court for that purpose.

Even if it were admitted that the beneficiary was in privity with the insured and that the insured was a party to the Connecticut suit by representation, still under well settled rules of law, the writ of error issued in this case should be dismissed or the judgment affirmed, for the reason that the decrees entered in the Connecticut suit were *not effective in another state for any purpose whatever* as against the insured or the beneficiary; they were not parties to that action and did not appear therein and were not residents of the state in which the decrees were entered. If the action were held to be one *in rem*, the judgment would be effective only as against the *res* taken under control of the court. In an action *in rem* it is necessary to serve some kind of process against the alleged owners of the *res;* such process may be by constructive service, by publication or otherwise, as may be provided by the laws of the state in which the action is pending.

The Connecticut suit was a proceeding *in personam* and not *in rem*; it was not brought to reach and effect property or interest therein within that state and which property was brought under the control of the court in connection with process against the person.

Except in proceedings *in rem* there is no such thing known to the law as an adjudication of a cause of action, which can be availed of as *res judicata* by any others than parties and their privies. The doctrine of *stare decisis* stands on a wholly different ground.

We think these principles of law are thoroughly established by numerous decisions of this Court. We content ourselves by citing and quoting from the following cases:

Brooklyn against Insurance Company, 9 Otto 362, was an action upon certain interest coupons issued in the name of the Town of Brooklyn to a railroad company. One of the defenses set up by the town was that by a decree of the Circuit Court of Lee county, Ill., in the action of the town of Brooklyn and others against the railroad company and others it was adjudged that the bonds and coupons of the town issued to the railroad company, were void and in no wise obligatory on the town and that the same be surrendered up by the parties holding the same to be canceled; that the Insurance Company was made defendant in such suit with the other holders and owners of the bonds and coupons by the name of "The unknown owners of certain bonds and coupons issued" by the town of Brooklyn to the railroad company; that the Circuit Court had jurisdiction of the subject matter and the parties defendant therein by the issuing of process and by proof of publication made as required by the laws of Illinois in the case of non-resident defendants. In disposing of this part of the defense this Court said:

> "The suit commenced and determined in the Circuit Court of Lee county was a proceeding wholly *in personam*, against the holders and owners of bonds and coupons which had been issued in the name of the town, and delivered to the railroad company. *Upon principle and authority no decree therein rendered could bind any one not personally served with process, or who did not appear. It could not affect the rights of non-resident holders of bonds and coupons, proceeded against by constructive service. Such service, as to them, was ineffective for any purpose whatever.*"

In Township of Empire v. Darlington, 11 Otto 87, this Court says:

> "It is scarcely necessary to say that the decree in the Circuit Court of McLean county, Illinois, rendered in 1878, perpetually enjoining the assessment and collection of taxes for the purpose of paying the bonds and coupons in question, and declaring said bonds and coupons to be void, did not conclude the rights of the defendant in error.

The bondholders were proceeded against by constructive service, as 'unknown owners and holders." The defendant in error was not served with process, nor did he appear. If the decree was binding upon the citizens and courts of Illinois, as to which we express no opinion, *it was ineffectual as to bondholders residing in other states, who were proceeded against only by constructive service.*"

In Webster v. Reid, 11 Howard, 437, this Court said:

"By the Act under which the suits were instituted, no other designation of the defendants was required than 'Owners of the Half-breed Lands lying in Lee county.' These suits were not a proceeding *in rem* against the land, but were *in personam* against the owners of it. Whether they all resided within the territory or not does not appear, nor is it a matter of any importance. *No person is required to answer in a suit on whom process has not been served, or whose property has not been attached.* In this case there was no personal notice nor an attachment or other proceeding against the land, until after the judgments. The judgments therefore, are nullities, and did not authorize the executions on which the land was sold."

In Pennoyer v. Neff, 5 Otto 714, it is held:

"In all the cases brought in the State and Federal Courts, where attempts have been made under the Act of Congress, to give effect in one state to personal judgments rendered in another state against non-residents, without service upon them, or upon substituted service by publication, or in some other form, it has been held without an exception so far as we are aware, *that such judgments were without any binding force, except as to property or interest in property within the state, to reach and affect which was the object of the action in which the judgment was rendered, and which property was brought under control of the court in connection with the process against the person.* The proceeding in such cases, though in the form of a personal action, has been uniformly treated, where service was not obtained, and the party did not voluntarily appear, as effectual and binding merely as a proceeding in rem, *and as having no operation beyond the disposition of the property, or some interest therein.* And the reason assigned for this conclusion has been that which we have already stated; *that the tribunals of one state have no jurisdiction over persons beyond its limits, and can inquire*

only into their obligations to its citizens when exercising its conceded jurisdiction over their property within its limits."

In Boswell's Lessee v. Otis, 9 Howard 348, the Court held:

"When the record of a judgment is brought before the court collaterally or otherwise, it is always proper to inquire whether the court rendering the judgment had jurisdiction. *Jurisdiction is acquired in one of two modes; first, as against the person of the defendant, by the service, of process; or second, by a procedure against the property of the defendant, within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question.* And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be, substantially, a proceeding *in rem.*"

In Reynolds v. Stockton, 140 U. S. 254, this court held:

"The full faith and credit demanded is only that faith and credit which the judicial proceedings had in the other state in and of themselves require. *It does not demand that a judgment rendered in a court of one state, without the jurisdiction of the person, shall be recognized by the courts of another state as valid.*

The essential conditions under which the exception of the *res judicata* becomes applicable are the identity of the thing demanded, the identity of the cause of the demand and of the parties in the character in which they are litigants."

3.

THE ISSUES IN THE TWO ACTIONS WERE NOT THE SAME.

It is true that a right, question or fact which has been put in issue and decided by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties or their privies; it is no less true "that to hold upon any *unsubstantial* ground that a controversy has been thus concluded is to do an injustice to the litigants. We must, therefore, be careful to see, when the contention of former adjudication is made, *that the matter was actually presented and decided.*

* * * The nature and extent of the former decree is not to be determined by seizing upon isolated parts of it or passages in the opinion considering the rights of the parties, but upon an examination of the *issues made and intended to be submitted,* and what the decree was *really designed to accomplish.* (Vicksberg v. Henson, 231 U. S. 259.)

In the Dresser case the court found that the company had in its hands a large excess or surplus in its mortuary fund over and beyond the amount required to pay existing death claims; in this case the court found that the insurer had in its hands, at the time the assessment in question was levied, an amount in its mortuary fund which was more than sufficient to pay all the death losses for which the assessment was levied. In this respect, therefore, the facts of the two cases are similar; the Connecticut court held as a conclusion of law "that it is proper and reasonable that the company should hold some such fund for the purpose of enabling it to pay losses promptly." *Whether the company had the right to forfeit a policy of insurance for failure to pay an assessment levied to meet specific death losses, when it had on hand in its mortuary fund a surplus in excess of the amount required to pay all the losses for which the assesment was levied, was not considered, litigated or determined in the Dresser suit, but that is the vital question in this case.* In the Dresser suit the court determined that this surplus in fact belonged to the policy holders and that ultimately it must be distributed among them pro rata. The question there was whether the company should be permitted to hold this surplus so as to enable it to promptly pay death losses. The determination of that question, however, did not involve the determination of the other question as to whether the company had the right to forfeit this insurance under such circumstances. In the case of Cromwell v. Sac. County, 4 Otto 351, this court held:

> "There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. * * * Where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, *the inquiry must always be as to the point or question actually litigated and determined in the original action;* not what might have been thus litigated or determined. Only upon such matters is the judgment conclusive in another action."

In the case of Russel v. Place, 4 Otto, 606, this court stated the law as follows:

> "It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear either upon the face of the record, or be shown by extrinsic evidence, *that the precise question was raised and determined in the former suit.*"

In the case at bar the Supreme Court of Minnesota held, in speaking of the Dresser litigation:

> "There was no question there of *a forfeiture,* nor of the *legality* of an assessment levied to pay specific death losses, *when the balance in the mortuary fund was ample to pay all such losses.* The right to hold a balance in the mortuary fund was affirmed, but *not the right to forfeit a policy for non-payment of an unnecessary assessment.* Neither the issues nor the parties were the same as in the case at bar." (R. 17.)

Johnson v. this plaintiff in error, 166 Mo. App. 261, was an action upon a certificate of insurance of like character and of the same terms as the certificate upon which this action is founded. The defense there was that the insured had failed to pay an assessment levied by the plaintiff in error to pay certain death losses. The defense was met by evidence showing

that at the time that the assessment was levied the insurer had on hand in its mortuary fund sufficient money to pay all the death losses for which the assessment was levied. The insurer also claimed in that case that the decrees in the Dresser suit constituted a bar or estoppel to the claim of Johnson upon the certificate of insurance. In discussing the effect of the Dresser decree the Missouri Appellate Court states:

> "The two cases are not identical in parties, cause of action or decisive issues. *Plaintiff was not a party to that suit;* there was no question of the forfeiture of her rights involved therein, *the issues before us were not considered in that case.* * * * Plaintiff stands on entirely different ground from that occupied by the plaintiffs in the Dresser case. This is an action at law and defendant is standing on a forfeiture alleged to have occurred automatically by Johnson's failure to pay an assessment."

4.

THE MINNESOTA COURT WAS AT LIBERTY TO DETERMINE FOR ITSELF THE JURISDICTIONAL QUESTIONS WHETHER, UNDER THE GENERAL LAW, THE DEFENDANT IN ERROR WAS A PARTY TO THE DRESSER SUIT AND WHETHER THE ISSUES IN THE TWO SUITS WERE THE SAME, AND WAS UNDER NO OBLIGATION TO TREAT THE CONNECTICUT DECREES AS A BAR OR ESTOPPEL TO THIS ACTION.

The state court refused to decide that the Connecticut decrees were a bar or estoppel to the right of recovery in the present action, and based its decision upon the ground that neither the issues nor the parties were the same in the two suits. This decision must necessarily have been based upon the ground that the Connecticut court had *no jurisdiction* either over the *defendant in error or the subject matter of this action.* The question arises, whether the state court had the right to determine for itself this question of jurisdiction, and whether if it was of the opinion that, under the general law, the defendant in error was not a party to the Dresser suit, or the issues in

the two suits were not the same, it was under any obligation whatever to treat the Connecticut decrees as a bar to this action.

We think that the case of Bigelow v. Old Dominion Copper Min. Co., 225 U. S. 111, is decisive of the question now under consideration. In that case the Massachusetts court held that a judgment rendered by the United States Circuit Court for the Southern District of New York did not create an estoppel by judgment. The judgment, which was claimed to operate as an estoppel, was a judgment of a United States Court. It was held that the judgment

> "in question is entitled to the same sanction which would attach to a like judgment of a court of the state of New York. * * * Its judgment is, therefore, entitled in the courts of another state to the same faith and credit which would attach to a judgment of a court of the state of New York."

In the Bigelow case this court proceeds to discuss and determine the following inquiry, "Did the Massachusetts court deny full faith and credit to the New York judgment by denying to it the effect of estoppel which attached to it in the courts of New York, or may it determine for itself, under principles of general law, whether the judgment was a bar to the suit against Bigelow?"

After a discussion of the authorities the Court proceeds to state the law as follows:

> "It is, therefore, well settled that the courts of one state are not required to regard as conclusive any judgment of the court of another state which had no jurisdiction of the *subject or of the parties.*"
>
> *"The faith and credit to be accorded does not preclude an inquiry into the jurisdiction of the court which pronounced the judgment,* or its right to bind the persons against whom the judgment is sought to be enforced."
>
> "The clause of the federal constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state applies to the records and proceedings of courts *only so far*

as they have jurisdiction. Wherever they want jurisdiction the records are not entitled to credit."

"The estoppel here insisted upon is grounded not upon *actual notice or appearance,* but upon a theory as to the relation between joint tort feasors under the laws of New York. *If the Massachusetts court was of opinion that under the general law, that relationship was not such as to make Bigelow a party by either privity or representation, it was under no obligation to treat the New York judgment as a bar to the suit in which it was pleaded."*

The court, therefore, reached the conclusion that the Massachusetts court did not deny full faith and credit to the New York judgment. If we understand this decision correctly it seems to follow that the Minnesota court had the right to determine for itself and conclusively that the Connecticut court had no jurisdiction over the defendant in error or the subject matter of this action, and that this court has no jurisdiction to re-examine that question.

5.

THE DECISION OF THE SUPREME COURT OF MINNESOTA IS NOT AGAINST THE TITLE, PRIVILEGE OR IMMUNITY ESPECIALLY SET UP OR CLAIMED BY THE PLAINTIFF IN ERROR UNDER THE UNITED STATES CONSTITUTION.

We think that an examination of the decrees and the decision of the Supreme Court of Minnesota will convince this court that these decisions are in fact not in conflict and that the state court gave to the Connecticut decrees all the effect to which they are entitled.

In the Dresser case the court found as facts that the allowance made for discontinuance of memebership often exceeded the actual amount necessary to cover the deficiency in payments arising from such discontinuance, and that from that source margins of excess of payment arose from time to time," and it also found that other margins arose "between the

amount of the losses paid and the amount of the losses assessed for," and that these margins accumulated from time to time in the hands of the insurer in its mortuary fund and were used by it in the prompt payment of losses in advance of the receipt of the moneys to pay the same from the regular assessments, by which receipts the said fund was constantly reimbursed. (R. 110.)

The plaintiffs claimed that it was improper and wrongful to accumulate these margins and to carry this balance in the mortuary fund, and claimed that the balance of margins should be distributed among the outstanding certificate holders. The court adjudged that the balance of the mortuary fund arising from the said excess of the amount received for assessments over the amount necessary for the payment of losses belongs to the certificate holders, but that the insurance company is reasonably entitled to hold the same as a necessary and proper fund for the prompt settlement of death claims, and that when that department of insurance is wound up, the balance of said mortuary fund remaining in the hands of the insurance company shall be distributed pro rata among the certificate holders, whose certificates are outstanding at that time. The *sole question* involved in the Dresser case, insofar as the same relates to the matters under consideration in this case, *was whether the policy holders were entitled to an immediate pro rata distribution of the excess or surplus in the mortuary fund,* or whether it was proper and reasonable that the company should hold the excess for the purpose of enabling it to pay losses promptly and until the termination of the outstanding insurance contracts. (R. 111.)

The evidence in this case shows that the plaintiff in error had accumulated in its mortuary fund a large sum in excess of the amount required to pay death losses, and that it was holding and using such excess for the purpose of paying death losses accruing subsequent to the time of the levying of the assess-

ment and in anticipation of future death losses, and the state court holds,

> "We see nothing in the language quoted, or in other provisions of the contract, that expressly or by necessary implication authorize the insurer to accumulate a 'mortuary fund' out of which to pay death losses that occur in the future." (R. 134.)

The court further states:

> "Great stress is laid on the practical necessity of keeping a balance in the mortuary fund. *It probably is true that it is convenient and altogether desirable to have money on hand out of which to pay promptly losses that have accrued. And we do not hold that this course is not warranted by the provisions of the contract.*" (R. 135.)
>
> "We doubt, also, whether defendant could legally have applied the balance in the mortuary fund to the payment of dues of members, *as we do not hold that the members were entitled to a distribution of this fund.*" (R. 136.)

In commenting further on the Dresser litigation the Minnesota court states:

> "The issues here are vitally different from those in the Dresser litigation. *There was no question there of a forfeiture, nor of the legality of an assessment levied to pay specified death losses, when the balance in the mortuary fund was ample to pay all such losses. The right to hold a balance in the mortuary fund was affirmed, but not the right to forfeit a policy for non-payment of an unnecessary assessment.* Neither the issues nor the parties were the same as in the case at bar. *The decrees are not even authority against plaintiff's contention here;* much less are they binding on the principle of *res adjudicata*, or estoppel by judgment." (R. 138.)

The Minnesota court is in entire accord with the decision in the Dresser case in holding *that the policy holders are not entitled to a distribution of the excess or surplus in the mortuary fund, and in holding that it is convenient and altogether desirable to have on hand in the mortuary fund money out of which to pay promptly losses that have accrued.* The Minnesota court states expressly that it does not hold that this course

is not warranted by the provisions of the contract. The Minnesota court places its decision upon the general law, that,

> "when the balance on hand in the mortuary fund is sufficient in amount to pay all losses that have accrued, an assessment to pay such losses is unnecessary and illegal, *at least to the extent that a forfeiture cannot be predicated upon the non-payment of such an assessment*";

and the court says:

> "It does not help to say that the proceeds would go to replenish the mortuary fund, or to say that it was necessary and lawful to keep a balance in this fund. *Equity, in its abhorrence of a forfeiture, will say that, when that fund reaches a sum sufficient to pay all accrued death claims, the beneficiary of a deceased member, who has paid his dues and assessments for twenty-five years, may well claim that a forfeiture cannot be based upon the failure of such member to pay an unnecessary assessment.*" (R. 135.)

In Blount v. Walker, 134 U. S. 607, there was a motion to dismiss the writ of error issued to the Supreme Court of South Carolina; the motion was granted. The federal question claimed to be involved in that action was that the Supreme Court of South Carolina had failed to give full faith and credit to a judgment of the Probate Court of North Carolina.

Mrs. Harris, a citizen of South Carolina, died in that state, leaving a last will and testament, by which she devised and bequeathed her estate to such person as Mrs. Blount might appoint by her last will and testament, duly executed. Mrs. Blount died in North Carolina, leaving a last will and testament, by which she devised and bequeathed all her estate to her husband, and directed the trustee appointed by the last will of Mrs. Harris to convey the property of the Harris estate to her husband. Mrs. Blount's will was duly admitted to probate in North Carolina and was also admitted to Probate in South Carolina by exemplified copy of the will. Mrs. Blount's will was properly executed according to the laws of North

Carolina, but was not executed in accordance with the laws of South Carolina. This court held:

> "The Supreme Court of South Carolina did not refuse to the judgment of the Probate Court of North Carolina full faith and credit. * * * When, therefore, the Supreme Court of South Carolina in construing Mrs. Harris' will, arrived at the conclusion that the estate of the latter would only pass to such person as might receive an appointment by a will duly executed according to the laws of South Carolina, that was an end of the case, and whether that conclusion was right or wrong is a matter with which we are not concerned. If we were of a different opinion, and, entertaining jurisdiction, were to reverse the judgment of the Supreme Court of South Carolina, we should do it upon the ground that that court erred in the construction of Mrs. Harris' will, and not upon any ground connected with the judgment of the Probate Court of North Carolina, which could not and did not determine that question. * * * The state court conceded that the judgment of the Probate Court of North Carolina established that the will of Mrs. Blount was her last will and testament duly executed, and its decision did not in the slightest degree proceed upon the denial of that fact, but gave the judgment the same force and effect that it had in North Carolina, for in neither of these states would the will, as such, dispose of the property that did not belong to the testatrix."

The Supreme Court of Minnesota, in construing the contract of insurance in this case, holds that the insurer was not authorized to accumulate a mortuary fund out of which to pay death losses that accrue in the future, and holds that

> "when this balance on hand is sufficient in amount to pay all losses that have accrued, an assessment to pay such losses is unnecessary and illegal at least to the extent that a forfeiture cannot be predicated upon the non-payment of such an assessment."

This decision was arrived at by a construction of the terms of the contract of insurance under the general law, and was not in conflict with the Connecticut decrees, for they do not purport to pass upon that question and could not have passed thereon, because the issues of that case were not the same as the issues in this case.

6.

THE DECISION OF THE SUPREME COURT OF MINNESOTA DOES NOT IMPAIR THE OBLIGATION OF THE CONTRACT WITHIN THE MEANING OF ARTICLE 1, SECTION 10 OF THE UNITED STATES CONSTITUTION.

Whether the Minnesota court rightly or wrongly construed the terms of the contract of insurance, this court has no jurisdiction to re-examine that question. The writ of error in this case is issued to a state court and not to a United States court.

It is the settled law that this court has no jurisdiction to re-examine the question of impairment of the obligation of a contract by a decision of a state court, where the point is presented to this court through a writ of error issued to a state court. In the case of Cross Lake Shooting & Fishing Club. v. Louisiana, 224 U. S. 632, the writ of error was issued to the Supreme Court of the state of Louisiana. In referring to Article 1, Section 10, of the Constitution, this Court says:

> "This clause, as its terms disclose, is not directed against all impairment of contract obligations, but only against such as results from a subsequent exertion of the legislative power of the state. It does not reach mere error committed by a state court when passing upon the validity or effect of a contract under the laws in existence when it was made. And so, while such errors may operate to impair the obligation of the contract they do not give rise to a federal question. * * * If there be no such law (that is, subsequent law of the state), or if no effect be given to it by the state court, we cannot take jurisdiction, no matter how earnestly it may be insisted that the court erred in its conclusion respecting the validity or effect of the contract; and this is true even where it is asserted, as it is here, that the judgment is not in accord with prior decisions on the faith of which the rights in question were acquired."

In Bacon v. State of Texas, 163 U. S. 207, the Court held:

> "The argument involves the claim that jurisdiction exists in this court to review a judgment of a state court on writ of error, when such jurisdiction is based upon an

alleged impairment of a contract by reason of the alteration by a state court of a construction theretofore given by it to such contract, or to a particular statute or series of statutes in existence when the contract was entered into. Such a foundation for our jurisdiction does not exist."

After referring to two earlier decisions of this court, the court continues:

"In cases of that nature there is room for the principle laid down that the construction of a statute, and admission as to its validity, made by the highest court of a state prior to the issuing of any obligations based upon the statute enter into, and form a part of, the contract, and will be given effect to by this court, as against a subsequent changing of decision by the state court by which such legislation might be held to be invalid. But effect is given to it by this court only on appeal from a judgment of a United States court, and not from that of a state court. This court has no jurisdiction to review a judgment of a state court made under precisely the same circumstances, although such state court thereby decided that the state legislation was void, which it had prior thereto held to be valid. It has no such jurisdiction, because of the absence of any legislation subsequent to the issuing of the bonds which had been given effect to by the state court."

There is nothing in the contract of insurance which limits the number and amount of the assessments which may be levied by the insurance company for the payment of death losses; there is nothing in the Connecticut decrees which compels the company to keep in its mortuary fund a balance beyond the amount required to pay existing death losses. There is no apparent reason for failing to increase the number of assessments levied during the course of the year for the payment of such losses except that "to make assessments frequently involves needless expense." (Brief 22.) The additional expense, however, would be incurred by the company and not by its policy holders; under the contract the company is entitled to expense dues of $3.00 per thousand of insurance in force and to ten cents for each assessment upon each mem-

ber and fifty cents registration fee for each second notice. The money thus raised belongs to the company and its stockholders and is the compensation which they receive for levying and collecting the assessments and adjusting and paying the death losses.

Ever since 1899 no new insurance has been written by the company and in consequence thereof the assessments for death losses must necessarily be increasing with much greater rapidity than would be the case if new and younger members were admitted; another result of the failure to write new insurance during these fifteen years must be that death losses and lapses are increasing beyond the experience of companies who strengthen themselves by the acceptance of new members. The company is not a going concern; it is now and for many years has really been in a gradual course of liquidation. It has no future before it.

The contract provides that death losses are to be paid in ninety days after due proof has been made; other assessment companies follow the practice, without apparent inconvenience, of levying assessments for death losses that have occurred and paying these losses out of the fund raised by such assessments; there is no reason why this company cannot follow the same practice. These matters have no bearing whatever upon the questions here involved and would not have been referred to by us if reference had not been made thereto in the briefs served by plaintiff in error.

The motion to dismiss or affirm should be granted with interest and the penalty provided for by the rules of this Court, and if the motion be denied then there should be an affirmance of the judgment.

Respectfully submitted,

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